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No.

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

DENNIS M. O'CONNOR, et. al.,
Petitioners,

VS.

MAGNO J. ORTEGA,
Respondent.

On Writ of Certiorari to the United States Courts of Appeal for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether it is a violation of a government employee's civil rights for government officials to make an administrative inventory of papers in a government office assigned to him while he is undergoing an administrative investigation.

(2) Whether the Court of Appeals erred in granting summary judgment to appellant and remanding to the District Court only on the issue of damages when petitioners had the right to have a jury decided whether or not they were justified in asserting a government official's "good faith defense" to their actions.

LIST OF PARTIES

Petitioners: Dennis M. O'Connor; Richard Friday; Dorothy Owen; Stefan Donoviel

Respondent: Magno J. Ortega

TABLE OF CONTENTS

	Page
Questions presented	i
List of parties	i
Opinions below	1
Jurisdictional grounds	1
Applicable federal laws	2
Statement of the case	2
1. Nature of the controversy	2
2. The proceedings below	4
Argument	5
I	
Introduction	5
II	
The plaintiff's expectation of privacy in a government office was unreasonable	6
III	
The administrative inventory by government officials was necessary and reasonably conducted	8
IV	
If the court of appeals reversed the decision for the petitioners, the case should have been remanded for trial	10
Conclusion	11

TABLE OF AUTHORITIES CITED

Cases

Page

Butz v. Economou (1978) 438 U.S. 478 ..... 6, 10

Chenkin v. Bellevue Hosp. Ctr. N.Y.C. ETC. (S.D. New York 1979) 479 F.Supp. 207 ..... 6, 7, 8

Chocallo v. Bureau of Hearings and Appeals, SSA (E.D. Pa. 1982) 548 F.Supp. 1349 ..... 6, 7, 8, 9

Harlow v. Fitzgerald (1982) 457 U.S. 800 ..... 6, 10

Katz v. United States (1967) 389 U.S. 347 6

Mancusi v. DeForte (1968) 392 U.S. 364 6

Sellars v. Procunier (9th Cir. 1981) 641 F.2d 1295 ..... 6, 10

United States v. Collins (2nd Cir. 1963) 349 F.2d 863 .... 5, 6

United States v. Nasser (7th Cir. 1973) 476 F.2d 1111 .. 5, 6, 7

Wallace v. Chappell (9th Cir. 1981) 661 F.2d 719 6

Williams v. Collins (8th Cir. 1984) 728 F.2d 721 ..... 5, 6, 7, 9

Constitution

U.S. Constitution, Fourth Amendment 2

Statutes

California Govt. Code §§ 810, et seq. 4

42 U.S.C. § 1983 ..... 2, 3, 5

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is reported at 764 F.2d 703 (1985), and is set forth at Appendix A-1 to A-7. The Judgment of the United States District Court for the Northern District is not reported, and is set forth at Appendix A-8.

JURISDICTIONAL GROUNDS

The decision of the United States Court of Appeals for the Ninth Circuit was filed and entered on June 27, 1985. The decision of the U.S. Court of Appeals is now final. A petition for writ of certiorari is due on or before September 25, 1985.

This Court has jurisdiction to review the lower decision by writ of certiorari under 28 U.S.C. § 1254(3).

APPLICABLE FEDERAL LAWS

1. United States Constitution, Fourth Amendment:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. 42 U.S.C. § 1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

STATEMENT OF THE CASE

1. Nature of the Controversy

Magno J. Ortega sued four officials of the Napa State Mental Hospital of the State of California for violation of his civil rights when they made an administrative entry into his locked office located on hospital premises without a search warrant. Dr. Ortega ("respondent") had been a psychiatrist at Napa State Mental Hospital ("Napa") for seventeen years, and had been assigned his office on Napa premises in his capacity as Chief of Professional Education. He had been under a personnel investigation since July 30, 1981 for his management practices, questionable

acquisition of a computer, and sexual harassment of female employees.

On or about July 31, 1981 respondent had been informed by Dr. Dennis M. O'Connor ("O'Connor"), Executive Director, that he was under investigation by Napa. He was ordered by letter to stay off hospital grounds unless he received written approval. Respondent requested and received two weeks vacation leave starting that July 31st. On August 14, 1981 respondent was informed that he would be placed on administrative leave with pay since the investigation was not complete.

On August 17, Dr. O'Connor was informed by a member of the Napa staff that a computer which he believed was state property had been removed from the Napa premises by respondent. Dr. O'Connor was further informed that respondent had called his secretary to inform her that he had entered the Napa premises that weekend to remove the computer.

Shortly thereafter, as part of an order by Dr. O'Connor to investigate the matter, four Napa employees including Richard Friday ("Friday") opened respondent's locked office on the Napa premises to determine what records and other State property was there. Three personal items involving a female medical resident were removed as relevant to the pending personnel investigation against the respondent. One of the state employees made several attempts to sort through the items in the office trying to separate and identify State property from other items. Finding the task impossible, he eventually boxed up the contents of the office and placed them in a locked room for the doctor to pick up.

As a result of a hearing before the California State Personnel Board, appellant was terminated from his position at Napa as of September 22, 1981, and he did not return to Napa (See Appendix A-9 to A-15).

Respondent filed his action in the District Court based on federal causes of actions under 42 U.S.C. § 1983.

2. The Proceedings Below

In the District Court petitioners and respondent filed cross motions for summary judgment.[1] Petitioners raised three issues: 1) that prosecutorial immunity applied to one defendant; 2) that respondent was barred from raising pendent State claims for failure to comply with the claims requirements of the California Torts Claims Act (Govt. Code §§ 810 *et seq.*); and 3) that respondent had no reasonable expectation of privacy as a government employee in a government office on government property; and that the State had the right to conduct an administrative inventory of his office in order to identify and protect State records and property.

Respondent's motion argued that there had been an unreasonable search of his office, an unreasonable seizure of his property, and consequently his civil rights had been violated. He further argued that his pendent tort claims were not barred for failure to comply with the California Torts Claim Act.

The District Court granted summary judgment to petitioners on all three issues. It issued a judgment but no written opinion. The transcript of the proceeding at the trial court indicates that the court concluded that the search was reasonable under the fourth amendment, that prosecutorial immunity applied to defendant Rubin, and that respondent's claims were barred. Respondent appealed the trial court's decision to the United States Court of Appeals on the issues of whether his civil rights had been violated and whether his pendent claims were barred.

The Ninth Circuit took a *de novo* review of both motions for summary judgment in *Ortega v. O'Connor* (1985) 764 F.2d 703. It affirmed the lower court decision with respect to the pendent state claims, but reversed on the issue of the reasonableness of the search under the circumstances of the case.

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[1] The original complaint named as an additional defendant Asher Rubin, Deputy Attorney General for the State of California. He was dismissed from the suit by the District Court on the grounds that he was entitled to prosecutorial immunity. His dismissal was not appealed by respondent.

The Court of Appeals' opinion found that, under the facts of the case, respondent had a subjective expectation of privacy, and said expectation was reasonable. The petitioner's actions were viewed as a violation of respondent's rights under 42 U.S.C. §1983.

The Court of Appeals ruling that it was a violation of a government employee's civil rights for government officials to attempt to make an administrative inventory of State property and records contained in a government office is in conflict with decisions by the United States Courts of Appeals for the Fifth Circuit (*Williams v. Collins* (8th Cir. 1984) 728 F.2d 721); the Seventh Circuit (*United States v. Nasser* (7th Cir. 1973) 476 F.2d 1111) and the Second Circuit (*United States v. Collins* (2nd Cir. 1963) 349 F.2d 863). Petitioners allege that respondent did not have a reasonable expectation of privacy, and the administrative search was reasonable under the factual circumstances.

ARGUMENT
I
INTRODUCTION

The facts in this case are a case of first impression for the Court of Appeals of the Ninth Circuit, but the issues have been dealt with in other circuits. The successful operation of government agencies rests in part on their ability to implement effective administrative controls over government records and property within their areas of responsibility. The Court of Appeals' decision would hamper officials' abilities to carry out government responsibilities effectively in the event that an internal personnel crises makes it necessary for supervisorial officials to investigate and determine the whereabouts of government property or records. The threat that considered, well-intentioned official actions on government premises concerning government property would lead to a lawsuit for violations of an employees' civil rights will intimidate and deter government officials in the proper, effective implementation of their work responsibilities. The recognition of the necessity for work-related investigations of individual employee work-areas was recognized in *United States v. Nasser,*

supra 476 F.2d 1111; *United States v. Collins, supra,* 349 F.2d 863; *Williams v. Collins, supra* 728 F.2d 721.

Petitioners further assert an argument not raised below with respect to the granting of respondent's motion for summary judgment. Petitioners contend that the Court of Appeals should not have granted respondent's motion for summary judgment on the issue of violation of his civil rights even if it overturned petitioner's motion. Petitioners submit that they are entitled to have a jury decide if they acted within the scope of their discretion, in good faith, with due care and in reasonable good faith belief that they were following the law; in effect whether the qualified immunity available to government officials applies to their actions. (See *Butz v. Economou* (1978) 438 U.S. 478; *Harlow v. Fitzgerald* (1982) 457 U.S. 800, 814; *Wallace v. Chappell* (9th Cir. 1981) 661 F.2d 719; *Sellars v. Procunier* (9th Cir. 1981) 641 F.2d 1295.)

II
THE PLAINTIFF'S EXPECTATION OF PRIVACY IN A GOVERNMENT OFFICE WAS UNREASONABLE

This Supreme Court has held that the individual's ability to involve the Fourth Amendment against unreasonable search and seizure depends "not upon a property right in the invaded place but whether the area was which there was a reasonable expectation of freedom from government intrusion." *Mancusi v. DeForte* (1968) 392 U.S. 364, 368; See *Katz v. United States* (1967) 389 U.S. 347, 352. Later decisions, however, have made it clear that "not all privacy interests which a person asserts are constitutionally protected." *Chenkin v. Bellevue Hosp. Ctr. N.Y.C. ETC.* (S.D. New York 1979) 479 F.Supp. 207, 211. In several instances and under appropriate circumstances the expectation of privacy has been considered unreasonable and outweighed by public or government interests. (See *United States v. Nasser supra,* 476 F.2d 1111, 1123; *United States v. Collins supra,* 349 F.2d 863, 868; *Chocallo v. Bureau of Hearings and Appeals, SSA* (E.D. Pa. 1982) 548 F.Supp. 1349, 1364; *Chenkin v. Bellevue Hosp. Ctr., N.Y.C. ETC., supra,* at p. 212, 215.)

Thus, the Court of Appeals for the Fifth Circuit held in *Williams* that the expectation of privacy in a government furnished desk was not reasonable when a job-related investigation or office inventory was undertaken by plaintiff's supervisors (at p. 728). A similar work-related surveillance was upheld in *United States v. Nasser, supra,* 476 F.2d 1111, 1123 the Court holding that the IRS had the right "to determine whether its work was being properly performed by an IRS employee in the areas assigned to him for the purpose" for such work.

Several Federal District Courts have also recognized situations where the reasonabable governmental need outweighs the individual's privacy. In *Chenkin v. Bellevue Hosp, Ctr., N.Y.C. ETC., supra,* 479 F.Supp.2d 7, 211, the search of a hospital employee's knapsack as part of a hospital policy to reduce the serious pilferage of hospital supplies was upheld. The Court stated that the expectation of privacy had not been reasonable since the public's interests in controlling pilferage from public hospitals was substantial and legitimate (at p. 214). Likewise, in *Chocallo v. Bureau of Hearings and Appeals, SSA, supra,* at 548 F.Supp. 1349, an administrative entry by government employees into a locked government office to retrieve government files was held not a violation of search and seizure. Plaintiff's expectation of privacy was considered unreasonable and the need of her supervisors to locate government property was overriding.

Critical to petitioners' position in the Court of Appeals is the issue of whether respondent had a "reasonable expectation of privacy". In the Court of Appeals, respondent reiterated that he considered his office private. Cited in support of his position is his long occupancy of the particular office and "his" own belief that he had the only key to his office. Ignored and unmentioned in his recitation of facts is that he was a public employee at all times during his occupancy of the office, that the office was a government office on the premises of Napa, a State-owned hospital, and that he had use of that office because he had responsibilities to Napa. Furthermore, as part of respondent's responsibilities, he frequently had the records and files of medical residents in his office as well as other State property.

Given the fact that respondent was a government employee in a government office, his own belief that this was his private office was not reasonable. In *Chocallo v. Bureau of Hearings and Appeals, SSA* (supra), 548 F.Supp. 1349, the court found that a plaintiff's assertion that her office in a privately-owned building was private was not persuasive since she was a public employee and her office space was government owned or leased. Even the fact that she had installed her own lock was considered irrelevant in determining if her expectation of privacy was reasonable (at p. 1363-1364). In light of the findings in *Chocallo,* respondent's contention that his office was private is even less persuasive since his assigned office was part of the Napa premises.

Petitioners respectfully contend that the Court of Appeals decision in the instant matter misapplied the law to the instant fact situation. Courts of Appeals and District Courts in other regions have recognized the need for reasonable government intrusion in government offices, desks, or work areas outweighing the right of the individual need to privacy in the government work place. Petitioners respectfully request this Court to overrule the decision of the Court of Appeals in this issue.

III

THE ADMINISTRATIVE INVENTORY BY GOVERNMENT OFFICIALS WAS NECESSARY AND REASONABLY CONDUCTED

Petitioners' entry into respondent's office was a reasonable administrative investigation, reasonably conducted under the circumstances of the instant case. Consideration should be given to the three-prong test applied in *Chenkin v. Bellevue Hosp. Ctr., N.Y.C., ETC, supra,* 479 F.Supp. 207. Consideration is given to the strength of the public necessity for the search; the efficacy of the search; and the degree and nature of the intrusion upon the individual (at p. 213). In *Chenkin* the Court found a strong public necessity in the need to protect public property in a major hospital institution. In other cases work-related investigations conducted in an effort to maintain the operation of government entities have been recognized as public necessity justifying ad-

ministrative entities. In *Chocallo v. Bureau of Hearings and Appeals, SSA, supra,* 548 F.Supp. 1349, the right of government employees' into plaintiff's locked office was upheld as work-related, a reasonable examination by government officials to ascertain the whereabouts of a file. In *Williams v. Collins, supra,* 728 F.2d 721, the Court stated plaintiff's government supervisors did not exceed their authority by entering his office and locked desk and temporarily seizing his personal items. The Court stated that the entry would have been reasonable either as part of the investigation of plaintiff's job performance or as part of an office inventory.

In the instant matter petitioners initiated their actions because there was an established hospital policy to inventory property within offices of departing or terminated employees to determine which property was State property and which was personal. The necessity of this inventory was particularly pressing because of concern about the previous entry by respondent into Napa property and removal of the computer. Such a search was further reasonable since it was respondent's management practices which were under investigation, and Napa files and records related to respondent's supervisorial responsibilities would forseeably be kept in his office. The respondent's items were removed as efficaciously as possible under the facts, with as minimal an intrusion as possible into respondent's property.

Petitioners contend that the Court of Appeals wrongly decided that the administrative inventory was unreasonable in light of the facts. The supervising officials were legitimately alarmed about the missing computer, and reasonably concerned about the possibility of other Napa files and property which might be located in respondent's office in his capacity as the Chief of Professional Education at Napa. The hospital's need to identify and safeguard Napa files and other property was a sufficiently important governmental interest that should have overridden respondent's expectation of privacy.

IV

IF THE COURT OF APPEALS REVERSED THE DECISION FOR THE PETITIONERS, THE CASE SHOULD HAVE BEEN REMANDED FOR TRIAL

Even assuming for argument's sake that petitioners motion for summary judgment was correctly overturned, the Court of Appeals was incorrect in granting respondent's motion for summary judgment. Petitioners contend that the Court of Appeals decision deprived petitioners of their right to assert a government official's qualified immunity, or "good faith defense" to defend actions undertaken as part of an administrative investigation. See *Butz v. Economou* (1978) 438 U.S. 478; *Harlow v. Fitzgerald* (1982) 457 U.S. 800; *Wallace v. Chappell* (9th Cir. 1981) 661 F.2d 719; *Sellars v. Procunier* (9th Cir. 1981) 641 F.2d 1295.

A qualified immunity has been applied to officials because it was considered unfair to subject them to liability for good faith actions based on information that later turned out to be incorrect or was made under the press of time. See *Sellars v. Procunier, supra,* 641 F.2d 1295. In a footnote to its opinion in the instant case the Court of Appeals implicitly recognized the good faith motives of the Napa official.[2]

The decision of the Court of Appeals has an intimidating effect on the well-intentioned efforts of government officials to carry out their supervisorial and administrative responsibilities. The decision undermines the strength and value good faith immunity since the officials who commit an error but do not violate a clear,

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[2] The relevant footnote, produced in full, stated:
"The motivation for the search of Ortega's is distinguishable from that in *Gillard,* which was the result of an angered school board member's desire to ascertain the authorship of political cartoons in a newspaper. 579 F.2d at 826. The search of Ortega's desk was apparently motivated by concern with the whereabouts of a computer and by the impending investigation of Ortega. We do not believe, however, that any distinctions that can be made between the motivations behind these two searches are relevant when determining the reasonableness of Ortega's expectation of privacy." (at p. 706.)

constitutional right or procedure are subjected to liability when they acted in a well-intentioned manner to protect legitimate government interests. In view of the fact that even the Court of Appeals did not deem any of the petitioners ill-intentioned or malicious, the case should have been remanded to the trial court for consideration of this issue.

CONCLUSION

This case raises significant federal issues that were wrongly decided below. The Court of Appeals has seriously inhibited the ability of government officials to carry out their supervisorial and administrative duties in times of internal administrative crisis. It further has undermined the validity of an important and long-recognized immunity, the existence of which encourages government officials to perform their duties without fear of unreasonable or harassing lawsuits. This Court should accordingly grant the petition for writ of certiorari.

Respectfully submitted,

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(Appendices follow)

Appendix 1

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 84-2169
USDC NO. C-82-4045-JPV

Magno J. Ortega,
Plaintiff-Appellant,
vs.
Dennis M. O'Connor, Exectuve Director, Napa State Hospital;
Richard Friday, Business Manager, Napa State Hospital,
Dorothy Owen, Personnel Officer, Napa State Hospital;
Stefan Donoviel, etc., et al.,
Defendants-Appellees.

OPINION*

[Filed June 27, 1985]

Argued and Submitted: April 11, 1985—San Francisco

Appeal from the United States District Court
for the Northern District of California
Hon. John P. Vukasin, District Judge Presiding

Before: Schroeder, Nelson and Reinhardt, Circuit Judges.

Nelson, Circuit Judge:

Magno Ortega appeals the district court's grant of summary judgment against him in an action alleging claims under 42 U.S.C. § 1983 and state law. We reverse and remand with respect to Ortega's section 1983 claim and affirm the grant of summary judgment against Ortega on his pendent state claims.

FACTS AND PROCEDURAL HISTORY

Ortega, a state licensed physician and psychiatrist, held the position of Chief of Professional Education at Napa State Hospital ("Napa"), a public institution operated and owned by the State of California. In July 1981, Ortega became the subject of an investigation into the management practices of his department.

Dennis O'Connor, Executive Director of Napa, asked Ortega to take vacation leave during the investigation and not to return without O'Connor's written approval. Upon expiration of Ortega's vacation, O'Connor placed Ortega on administrative leave pending completion of the investigation. The investigation concerned the propriety of the acquisition of a computer and sexual harassment charges.

On August 17, 1981, a hospital staff member informed O'Connor that Ortega had told his secretary that he had taken the computer to his home. O'Connor apparently believed that the computer belonged to the hospital, though in fact, Ortega had acquired the computer with his own funds and with funds donated by resident physicians. Although Ortega routinely took the computer home over weekends, O'Connor became concerned and directed four hospital officials to enter Ortega's office and investigate the matter.

Upon entering Ortega's office, the investigating officials attempted to sort through the items that they found, which included many of Ortega's personal belongings and papers. The officials took some of the items for use in the ongoing investigation of Ortega. The lock on the door to Ortega's office was changed, and Napa personnel eventually removed the items from the office for storage in a special locked area, where they were available for Ortega to pick them up.

The office, located on Napa's campus, had been assigned to Ortega in his capacity as Chief of Professional Education. Ortega had occupied the office for seventeen years and his name was on the door. He alleged that he kept the office locked at all times when he was not in it and was the only person who had a key. Ortega believed that no one else had ever entered his office without his permission during his tenure. Napa contends that the investigating officials believed that the computer was state property and that they believed that state records and files in Ortega's office needed protection. The computer, however, was not kept in Ortega's private office, but in an adjacent room, and the state records and files were located in the secretaries' office.

Napa contends that established hospital policy was to inventory property in the offices of departing or terminated employees to determine which property was state property and which was personal. At the time the officials entered his office, however, Ortega had neither been terminated nor was he scheduled to depart: he was merely on administrative leave pending completion of the investigation. Nothing in the record suggests that inventory procedures were conducted on a regular basis. Ortega, furthermore, was never informed that his office could be entered at any time and investigated. The investigation subsequently led to Ortega's termination in October 1981.

Ortega thereafter filed this section 1983 action alleging violation of his fourth amendment right to be free from unreasonable governmental intrusion. He also attached pendent state claims for invasion of privacy and breach of covenant of good faith and fair dealings. Prior to trial, both Ortega and the state defendants moved for summary judgment. The district court granted the defendants' motion, concluding that the search was reasonable under the fourth amendment and that the state causes of action were barred by Ortega's failure to comply with the California Torts Claims Act.

DISCUSSION

(a) Standard of Review

We review the district court's grant of summary judgment de novo to determine whether, viewing the facts in the light most favorable to the nonmoving party, there is any genuine issue of material fact and whether the substantive law was correctly applied. *Greenfield v. Kootenai County,* 752 F.2d 1387, 1388 (9th Cir. 1985).

(b) Section 1983 Claim

Ortega's section 1983 claim is grounded in the fourth amendment protections against unreasonable searches and seizures. The ability to invoke those protections depends "not upon a property right in the invaded place but [upon] whether the area was such that there was a reasonable expectation of freedom from government intrusion." *Katz v. United States,* 389 U.S. 347, 352 (1967).

Not all privacy interests asserted are constitutionally protected, however. *See United States v. Roberts,* 747 F.2d 537 (9th Cir. 1984). Fourth amendment privacy analysis involves both a subjective and an objective component: a party invoking fourth amendment protection must have a subjective expectation of privacy and society must be prepared to recognize and protect such an expectation as reasonable. *See United States v. Pollock,* 726 F.2d 1456, 1465 (9th Cir. 1984); *United States v. Bunkers,* 521 F.2d 1217, 1219 (9th Cir.), *cert. denied,* 423 U.S. 989 (1975).

As the Chief of Professional Education, Ortega dealt routinely with medical residents and professional staff. He worked in an office secured by a locked door, with a desk containing personal papers and files.[1] Furthermore, as a physician and psychiatrist, Ortega possessed sensitive and confidential information about patients or people with whom he dealt. In the seventeen years that Ortega occupied the office, the office had never been entered without his permission. Office inventories were apparently reserved for employees who were departing or were terminated. When Ortega's office was searched, he was neither scheduled to depart nor had he been terminated. These facts suggest that Ortega had a subjective expectation of privacy in his office that society is prepared to recognize and protect as reasonable. *See Bunkers,* 521 F.2d at 1219; *cf. Mancusi v. DeForte,* 392 U.S. 364, 368-69 (1968) (union official, even though he shared office, was

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[1] Ortega claims the following were searched and seized by Napa:

(a) Purely personal correspondence from friends and family.

(b) Photographs of friends, acquaintances, and family.

(c) Medical files and correspondence from private patients unconnected to Napa State Hospital.

(d) Appointment books and personal notes, as well as official appointments.

(e) Personal financial records and accounts.

(f) A file approximately 18 feet long of IBM cards containing teaching aids and notes.

(g) Personal souvenirs, gifts and presents belonging to Ortega.

(h) Copyrighted manuscript.

entitled to expect that records would not be taken from his office without his permission).

In *Gillard v. Schmidt*, 579 F.2d 825, 829 (3d Cir. 1978), the Third Circuit, confronting a similar situation, held that a school guidance counselor had a reasonable expectation of privacy in his desk. *Gillard* involved a search of a guidance counselor's desk, which was located in one large room that had been partitioned into five smaller offices. 579 F.2d at 826. The court's finding of a reasonable expectation of privacy rested, in part, on the sensitive nature of information likely to be found in a guidance counselor's files. 579 F.2d 828.[2] Here, Ortega's office possessed even more indicia of an expectation of privacy than did the desk in *Gillard:* Ortega's name was on the door; the office was kept locked and Ortega believed he possessed the only key; Ortega had occupied the office for seventeen years; and no policy provided for inspections of employees' offices. Ortega's office, moreover, was likely to contain sensitive and confidential information about Ortega's patients, as well as personnel files. *See also United States v. Speights*, 557 F.2d 362, 363 (3d Cir. 1977) (police officer had reasonable expectation of privacy in police-issued locker secured by police lock and personal lock, even though locker was owned by police department and supplied primarily for storage of police equipment).[3]

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[2]The motivation for the search of Ortega's office is distinguishable from that in *Gillard*, which was the result of an angered school board member's desire to ascertain the authorship of political cartoons in a newspaper. 479 F.2d at 826. The search of Ortega's desk was apparently motivated by concern with the whereabouts of a computer and by the impending investigation of Ortega. We do not believe, however, that any distinctions that can be made between the motivations behind these two searches are relevant when determining the reasonableness of Ortega's expection of privacy.

[3] Napa's efforts to distinguish *Gillard v. Schmidt*, 579 F.2d 825 (3d Cir. 1978), and *United States v. Speights*, 557 F.2d 362 (3d Cir. 1977), by characterizing the search of Ortega's office as a routine administrative search are unpersuasive. It is clear that Ortega was still a Napa employee when his office was searched, and there is no evidence in the

The circumstances of Ortega's case are distinguishable from those in decisions finding no objective expectation of privacy in the workplace, because Napa had no general inspection policy. In *United States v. Bunkers*, 521 F.2d 1217 (9th Cir. 1975), for example, a postal employee could claim no objective expectation of privacy in a locker because well-publicized regulations informed postal employees that lockers were subject to search as part of an effort to combat pilferage and stealing. *Id.* at 1219. Similarly, in *United States v. Collins*, 349 F.2d 863 (2d Cir. 1965), *cert. denied*, 383 U.S. 960 (1966), the court upheld a search of a Customs service employee's jacket for a stolen emerald where Customs employees were aware of the possibility of searches and where such searches occurred regularly. 349 F.2d at 867-68. *See also Chenkin v. Bellevue Hospital Center, New York City Health & Hospital Corporation*, 479 F. Supp. 207 (S.D.N.Y. 1979) (hospital's publicized policy of random inspection of parcels at hospital exits, designed to control pilferage, did not violate fourth amendment).

Here, Napa had never instituted surveillance or searches and had no general inspection policy that might have defeated Ortega's expectation of privacy in his office. The entry into the office seems to have been for no other purpose than to secure evidence for use in the ongoing investigation of Ortega. We therefore reject Napa's contention that Ortega's expection of privacy in his office was unreasonable.[4] We conclude that the search of Ortega's office was not a reasonable search under the fourth amendment.

The record in this case justifies a grant of partial summary judgment for Ortega on the issue of liability for an unlawful

---

record showing that Ortega knew of any policy providing for inspection of his office.

[4] Napa's reliance on *Williams v. Collins*, 728 F.2d 721 (5th Cir. 1984), for the proposition that Ortega had no expectation of privacy in his office is unjustified. *Williams* is not relevant to our inquiry here, because it considered only whether the defendants had exceeded their authority and thereby lost their statutory immunity; it did not address fourth amendment requirements.

search; we will therefore remand to the district court for an entry of judgment in favor of Ortega and for a hearing to determine the amount of damages. *See Gillard v. Schmidt,* 579 F.2d 825, 829 (3d Cir. 1978); *see also International Longshoremen's & Warehousemen's Union v. Kuntz,* 334 F.2d 165, 171 (9th Cir. 1964).

(c) Pendent Claims

Ortega urges this court to accept his assertion that his pendent state claims should be excused from meeting the requirements of the California Torts Claims Act. The applicable statutes condition the right to sue the state upon timely filing of claims. This court has held that failure to comply with state-imposed procedural conditions to sue the state bars the maintenance of a cause of action based upon these pendent state claims. *See Willis v. Reddin,* 418 F.2d 702, 704 (9th Cir. 1969). Cal. Gov't Code § 905.2 states that a claim must be presented for "all claims for money or damages against the state," including claims for "money damages (1) on express contract, or (2) for an injury for which the state is liable" in accordance with the code. Ortega failed to file a claim with the State Board of Control as required by Cal. Gov't Code § 905.2 and his claim is now barred by the statute of limitations. Cal. Gov't Code §§ 911.2, 911.4. Ortega is therefore barred from pursuing his state-law claims.

CONCLUSION

We affirm the grant of summary judgment against Ortega on his pendent claims and reverse and remand with instructions to grant Ortega summary judgment and determine damages on his section 1983 claim.

Appendix 2

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

C-82-4045 JPV

Magno J. Ortega
v.
Dennis M. O'Connor, et al.

JUDGMENT

[Filed May 30, 1984]

In accordance with the Order of May 23, 1984,

IT IS HEREBY ADJUDGED that Summary Judgment is granted in favor of defendants, and this action is dismissed.

Dated: May 29, 1984

/s/ J. P. VUKASIN
J. P. Vukasin
United States District Judge

Appendix 3

CALIFORNIA STATE PERSONNEL BOARD

[Letterhead]

Case No. 13418

In the matter of the Appeal by
MAGNO J. ORTEGA
From dismissal from the position of
Chief of Professional Education, Mental
Hospital, at Napa State Hospital,
Department of Developmental Services
at Imola

DECISION

WHEREAS, the State Personnel Board has considered carefully the findings of fact and Proposed Decision filed by the Hearing Officer in the above matter; and

WHEREAS, by said Proposed Decision the appeal is denied;

IT IS RESOLVED that the findings of fact and Proposed Decision of the Hearing officer in said matter are hereby adopted by the State Personnel Board as its decision in the case.

* * *

I hereby certify that the State Personnel Board made and adopted the foregoing resolution, and I further certify that the attached is a true copy of the Hearing Officer's Proposed Decision adopted by the State Personnel Board in Case No. 13418 on March 17, 1982.

RONALD M. KURTZ
Ronald M. Kurtz,
Executive Officer,
State Personnel Board.

BEFORE THE STATE PERSONNEL BOARD
OF THE STATE OF CALIFORNIA

Case No. 13418

In the Matter of the Appeal by
Magno J. Ortega

From dismissal from the position of Chief of Professional Education, Mental Hospital, at Napa State Hospital, Department of Development Services at Imola.

PROPOSED DECISION

This matter came on regularly for hearing before James C. Waller, Hearing Officer, State Personnel Board, on October 29, November 16, 17, December 29, 30, 1981 and February 3, 1982 at Imola, California.

The appellant, Magno J. Ortega, was present without counsel.

The respondent was represented by George Deukmejian, Attorney General, by Asher Rubin, Deputy Attorney General.

Evidence having been received and duly considered, the Hearing Officer makes the following findings of fact and Proposed Decision:

I

The above dismissal effective September 22, 1981 and appellant's appeal therefrom comply with the procedural requirements of the State Civil Service Act.

II

The appellant has worked for the State since 1964 as the Chief of Professional Eductaion, Mental Hospital at Napa State Hospital. He supervised the Psychiatric Residency Program. The appellant is arrogant and has an abrasive personality. He did not get along well with the Hospital Executive Director or other Hospital Administrators. He demanded his own way at all times.

III

As cause for dismissal it is alleged that the appellant sexually harassed 2 female employees improperly placed a resident on leave without pay, requested that residents contribute money to purchase a computer and mislead the residents by promising that they would be given overtime work to cover their contributions when overtime work for such a purpose is not authorized. It is also alleged that the appellant deceived the Hospital Executive Director by telling him that the computer had been donated to the hospital and that the deception caused the Director to sign improper sub-purchase orders for computer parts. It is further alleged that the appellant took personal control of the computer and placed it in his home.

IV

In 1980 a young female student assistant worked in the Professional Library under the appellant's supervision. The appellant requested her telephone number, invited her to lunch, requested her to help him write a book, called her at home on the telephone and embarrassed her by putting his hands on her and by putting his arm around her. The student felt sexually harassed. She believed that she had to put up with the appellant's actions in order to insure her continued employment. She eventually overcame her fear and filed a complaint of sexual harassment.

V

During the 1978-79 academic year the appellant sexually harassed a female social worker at Napa State Hospital. He took her into an empty office, closed the door and attempted to kiss her. She refused his advances and was very embarrassed. During subsequent weeks he continued to harass her by asking to see her after class and suggesting that she might change her mind about his advances. He made her very uncomfortable. She also filed a complaint alleging sexual harassment.

VI

The State is interested in having an integrated data processing system. Rules have been promulgated that make it difficult for a Department to buy a separate computer or computer parts with State money. The appellant decided to circumvent all the studies and approvals required by the State Rules and Regulations. He asked the residents under his supervision to donate money for the purchase of a computer. He told the residents that he would authorize some form of overtime for each resident in order to have the State, in effect, repay the money they donated. Many of the residents made substantial cash contributions. The appellant purchased a computer. The appellant did not have authority to authorize overtime for such a purpose and it was never done. The residents were not reimbursed for their contributions. The residents were under the appellant's complete control and supervision. Requesting subordinates to contribute money for any cause is a form of coercion which cannot be condoned at a State institution.

VII

The appellant placed a Dr. Vaughan, a resident under his supervision, on unpaid leave for the month of July, 1981. The appellant told the Personnel Office that Dr. Vaughan had requested the leave. The appellant's statement was false. Dr. Vaughan had not requested leave. He had asked to work at Napa State Hospital that month rather than go to another location. Dr. Vaughan made the request to remain at Napa because his wife was having surgery. Dr. Vaughan did not know that his request to work at Napa had been denied or that the appellant had placed him on unpaid leave. Dr. Vaughan worked all month at Napa State Hospital and was shocked when he found that he would not be paid. He filed a grievance and was eventually paid. Dr. Vaughan contends that the appellant placed him in a non-pay status for the month of July because he refused to contibute to the computer and in fact told other residents that they should demand the return of their money.

VIII

In March, 1981 the appellant made arrangements for Mr. Paul Saeedi to demonstrate the computer he had acquired to the residents. Mr. Saeedi came to the hospital on seven different occasions and gave two hour classes. On June 30, 1981 the appellant submitted a contract for the State to pay Mr. Saeedi $1,800.00. The appellant violated State Rules and Policies by not obtaining prior approval of the contract and by agreeing to pay amounts in excess of the authorized rates for such services. The contract was later disapproved and Mr. Saeedi has not been paid.

IX

On April 15, 1981 the appellant requested the Executive Director of the Hospital to sign two sub-purchase orders for computer parts in the amount of $1,388.00. He told the Executive Director that a computer and printer had been donated to the hospital. The Executive Director signed the orders. The appellant mislead the Executive Director. The computer and printer had not been donated to the hospital and the computer parts were not being ordered. The parts had already been delivered. The appellant later took the computer to his home. The computer has never been donated to the hospital and it is not at this time hospital property.

X

During the hearing the appellant made repeated assertions that he was denied prehearing discovery. Those assertions are without merit. He was provided all relevant information and documents. On the other hand, the appellant steadfastly refused to comply with instructions to provide similar information to the Department.

* * *

PURSUANT TO THE FOREGOING FINDINGS OF FACT THE HEARING OFFICER MAKES THE FOLLOWING DETERMINATION OF ISSUES:

The appellant's conduct violates the provisions of Section 19572 of the Government Code. The allegations set forth in the notice of dismissal were established by the evidence. The appellant's dismissal is warranted and should be sustained.

* * *

WHEREFORE IT IS DETERMINED that the dismissal taken by respondent against Magno J. Ortega effective September 22, 1981 is hereby sustained without modification.

* * *

I hereby certify that the foregoing constitutes my Propose Decision in the above-entitled matter and I recommend its adoption by the State Personnel Board as its decision in the case.

Dated: March 8, 1982

James C. Waller,
Hearing Officer
State Personnel Board

Appendix 4

CALIFORNIA STATE PERSONNEL BOARD

[Letterhead]

Case No. 13418

In the Matter of the Appeal by
Magno J. Ortega

From dismissal from the position of Chief of Professional Education, Mental Hospital, at Napa State Hospital, Department of Developmental Services at Imola.

DECISION ON PETITION FOR REHEARING

I hereby certify that by motion duly made, seconded and carried, the State Personnel Board on June 23, 1982 denied the Petition for Rehearing in the above matter.

DATED: June 23, 1982.

RONALD M. KURTZ
Ronald M. Kurtz
Executive Officer, State Personnel Board

85-530

Supreme Court, U.S.
FILED
NOV 4 1985
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1985

Dennis M. O'Connor,
et al.,
Petitioners,

vs.

Magno J. Ortega,
Respondent

On Writ of Certiorari
to the United States
Courts of Appeal for
the Ninth Circuit

REPLY TO PETITION FOR WRIT OF CERTIORARI

Magno J. Ortega

Counsel of Record:
MAGNO J. ORTEGA
(in propria persona)
1239 Thompson Ave.
Napa, Calif. 94558
Tel. (707) 255-6726

GRAPE PRESS 1226 3rd St. Napa Ca 94558

BEST AVAILABLE COPY

QUESTIONS PRESENTED

(1) Whether, during an administrative investigation, it is a violation of employee's civil rights protected under the Fourth and Fifth Amendments, to conduct a hasty "inventory" for self-incriminating evidence in a locked government office assigned to him for more than 17 years, search and seize all his papers, seal and store them as "Evidence, Napa County Sheriff's Department', refuse under the State Attorney General's official letterhead to surrender any on written demands of employee, re-examine what was hastily boxed for "rebuttal evidence" to threaten his witness, and show her semi-nude photograph at his hearing.

(2) Whether, after waiving their right to a jury trial (which was originally demanded for respondent) by petitioners' opting for a summary judgment in which trial judge misruled on the basis of the

Chenkin test, which the Court of Appeals reversed, government officials are entitled to another "bite" at a "good faith defense" (already discounted in the summary judgment) before a jury, after Court of Appeals correctly reapplied the Chenkin test and remanded the case to the District Court only on the issue of damages, and Court of Appeals denied their petition for stay of its decision while they decide whether to petition for writ of certiorari on grounds of "good faith".

LIST OF PARTIES

Petitioners:
Dennis M. O'Connor; Richard Friday;
Dorothy Owen; Stephen Donoviel.
Respondent: Magno J. Ortega

REAL PARTIES OF INTEREST: Pages

Dr. James Barter, ex-Acting Deputy Director, Department of Mental Health, Health and Welfare Agency, California 10,11

Dr.Joe Tupin, ex-Chairman, Department of Psychiatry, Univ. of Calif. at Davis 15,16,17

Mr. James Waller, Chief, Hearing Office, CSPB 7,17,21,24,25

Mr. Asher Rubin, Deputy A.G., 7,8,23,26
counsel for Napa in peon's
appeal against dismissal and
now SPB counsel in ex-peon's
petition for writ of mandate
for reinstatement as C.P.E.

Dr. Thomas Laskay, deceased 17,43,48,58
Dr. Richard Vaughn, ex-con 11,54,A-32
Dr. Joyce Sutton, ex-witness 4,23,26-27
Other doctors/ex-residents 22,31,52
Dr. Magno Ortega, ex-peon 3,15,20,36

TABLE OF CONTENTS Pages

Questions presented i
List of parties ii

Jurisdictional grounds 1
Applicable federal laws 2

Statement of the case, w/ dates/details
1. Nature of the controversy 3,24
Facts and allegations (unproven) 3
"Findings" and errors (reversible) 7
2. The proceedings below 37

Argument, with context and content 38

I. Introduction, competing interests
II. Plaintiff's expectation of
privacy in government office was
reasonable and respected and did
not interfere with investigation 41
III. Administrative "official
inventory" was unnecessary, un-
reasonable, premature, ineffica-
cious and intrusive, in violation
of 4th, 5th Const. Amendments 55
IV. Only if petitioners were
granted qualified immunity can
they appeal for more immunity 58

Conclusion ("erroneous, frivolous") 60
Recommendations ("deny, instruct") 61

LIST OF AUTHORITIES CITED

Pages

Petitioners' Cases (15 pages, iii-x)

Butz v. Economou (viii) 38,49,58
Chenkin v. Bellevue (x) ii,38,53,56
Chocallo v. Bu. of Hearings (ix) 50,56
Harlow v. Fitzgerald (vii) 48
Sellars v. Procunier (vi) 47
U. S. v. Collins (v) 44
U. S. v. Nasser (iv) 43
Williams v. Collins (iii) 46

Respondent's Cases (4 paragraphs)

Applebaum v. Bd. of Directors of Barton Memorial Hospital (1980) 163 CR 836 (biased decision-makers constitutionally impermissible) A-10
Skelly v. SPB (1975) 15 C2d 194 (minimum pre-removal safeguards) 20
Tex-Cal Land v. ALRB (1979) 156 CR 1 (prosecute or adjudicate) A-10

Federal

USCA Const Amend 4 i,2,4,54,56,65
Amend 5 i,2,4,56,65
42 U.S.C. Sec. 1983 2

State (all violated or disregarded)

Cal. Evidence Code Sec. 776 30
(counsel must call witness)
Govt. Code Sec. 11183. 53
(confidentiality of information)
Sec. 14780. 8
(transmission of contracts)
Sec. 19572. . . . .A-37
(causes for punitive action)
Sec. 19574.5. 51
(administrative leave rule)
Sec. 19579. 23
(absence at hearing is default)
Sec. 19581. 28
(employee right to subpoenas)
Sec. 19582(b) 35
(proposed decision to parties)
Admin. Agency Practice Sec. 2.41. . .22
(procedure to invoke discovery)
Electronic Data Processing Sta- . .A-17
tutory Provisions (SAM 4819.3)
Sexual Harassment Guidelines. . . .A-16

No.

IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1985

Dennis M. O'Connor, et al.,

Petitioners,

vs.

Magno J. Ortega,

Respondent

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is reported at 764 F.2d 703 (1985). The Judgment of the United States District Court for the Northern District is not reported, but recounted below.

JURISDICTIONAL GROUNDS

The decision of the United States Court of Appeals for the Ninth Circuit was filed and entered on June 27, 1985.

Stay to file this writ was denied and it is now final.

This Court has jurisdiction to review the lower decision or deny this petition for writ of certiorari.

APPLICABLE FEDERAL LAWS

1. U.S.C.A. Const. Amend. 4: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. U.S.C.A. Const. Amend. 5: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation."

3. 42 U.S.C. Sec. 1983: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be

subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

STATEMENT OF THE CASE

(Exhibits [1-21] were petitioners' during past administrative hearing, Exx. [A-OOO] and [i-xxiv] are respondents'.

([I-VI] are days of hearing, [VII] was ordered on the 5th day:p.111/line3 or [V:111/3]: "complete your testimony in writing...")

1. Nature of the Controversy: Timing of (A, a-z) events/allegations and (B, 1-17) fact-finding/errors are both due process issues, intertwined below for brevity and accuracy.

A. HOSPITAL CONTROVERSY: DATES/EVENTS

a) Magno J. Ortega (respondent) sued "Napa" officials (petitioners) for violation of his civil rights when they (1) seized his Napa office before he left on

administrative leave without pay for one week -- (extended at his request to two weeks of "vacation") -- to investigate "coercion" of contributions for a computer, and (2) searched it without warning or warrant, (3) expropriated his property, packed and sealed them with tapes marked "Evidence, Napa County Sheriff's Dept.", (4) refused to return them, (5) re-ransacked them, (6) stole 10-year old souvenirs to "rebut" Dr. Sutton (Appendix A, [17-19]) and (7) withheld his salary checks for $11,128.95 unconstitutionally, for six months, after which they deducted the total cost of lost keys ($6.25) from $11,128.95 [i]. U.S.C.A. Const. Amend. 4, 5.

(Petitioner had to represent himself during the hearings and has no funds left for legal fees to answer this wanton petition. His reputation now damaged by "Napa", he has no income or credit to abridge court briefs below.)

b) Dr. Ortega as Chief of Professional

Education, State of California, had offices at home and at Napa for more than 17 years. There had been no grievances from or against him before the spring of 1981. He last received an annual merit raise of $3,648 on July 1, 1981 [i-d].

c) Dr. Ortega's psychiatric residents rotate to different training centers. They are not counted in any budgets based on hospital staff/patient ratios. His budget is separately approved from Napa's although Napa helps with the paper work.

d) Dr. Ortega's residents graduate every four years and cannot wait for the state to provide them with a computer. In March, 1981, they bought an Apple II plus micro-computer system [E] and had a letter-quality printer "to hook up with your Apple computer" donated on April 4, 1981 [15a-2]. Dr. Ortega secured a feasibility study [D] on March 18, 1981

from U.C., San Francisco for accessories (e.g. a Modem to link up with Stanford and UCSF) and drew up a computer training consultant contract on March 27, 1981. He showed both to Dr. O'Connor, whom he had trained but was "not an expert on computers" and was then hospital director at Napa. [II:89/10 - 90/4, III:137]

He is now director of developmental services in Sacramento. The real parties of interest then were Dr. Ortega's competitors who needed tenure in office or academia, or his training funds, or both.

The transmission of the contracts from Napa to, for approval by, the Department of General Services in Sacramento had been illegally delayed for the first time in 17 years.

e) On April 15, 1981, the last day to commit allocated moneys [J, V:8, 38],

Dr. O'Connor as the business manager's boss, approved the sub-purchase of accessories, including an Applewriter [13a], out of Dr. Ortega's budget.

1) Mr. Friday, the business manager, testified on 10/29/81, that he thought the Applewriter was a printer [I:112/6-25]. It is a word-processing program, not hardware. The sub-purchase order [13a] was not presented in evidence and its production ordered by court [H] on 11/2/81. But hearing officer, Mr. Waller, refused to call Mr. Friday [IV:7/2 - 10/4] as Dr. Ortega's witness to explain, among other discrepancies, where he can procure even a dot matrix printer for the $75.00 approved by Dr. O'Connor for the Applewriter.

(Dr. O'Connor had already "forgotten" [II:62/13] he had signed a thank-you note [15b] for the printer

donated to Dr. Ortega's program "to facilitate the dissemination of learning to all professionals".)

f) Dr. Ortega told Dr. O'Connor that Mr. Friday had not transmitted his computer training consultant contract as soon as he got them, as Govt. Code Sec. 14780 requires:

> "Every such contract shall be transmitted with all papers, estimates, and recommendations concerning it to the department and, if approved by the department, shall be effective from the date of such approval."

2) Also at that first day of hearing, Napa's counsel, Mr. Rubin, tried to get Mr. Friday to say that the computer training contract was not approved. All Mr. Friday would say was that it had not been processed [I:119]. After Napa Superior Court ordered full discovery, an unprocessed copy [16a] was presented as "evidence".

(Another contract which had already

been processed and approved [16b-1,2], effective July 16, 1981, was produced during Dr. Ortega's cross-examination on 11/17/81. [III:48 - 52])

g) On May 22, 1981, Dr. O'Connor sent Dr. Ortega a memo: "Your contract for Professional Education's computer is being reviewed by Mr. Friday. . . see him and discuss this contract." Mr. Friday asked for the serial numbers in case of equipment theft and promised prompt transmission of all contracts.

"Finding" IX, A-13 of petition, -- (that Dr. Ortega "mislead the Executive Director" into believing the equipment was donated to the hospital) -- cannot stand unless Dr. O'Connor had also forgotten above memo [D-1].

(When cross-examined during Dr. Ortega's appeal against dismissal, "In all the time you knew me as

Chief of Professional Education, have you been misled by me?" his reply was "Only you know that." [II:112/22-24])

h) Dr. O'Connor also approved the sub-purchase order [13b] for a Modem to link the residents' training computer to both Stanford University and UCSF. [II:93, V:17]

Dr. Ortega's post-graduate training program was the only one in the West Coast that was affiliated to two major universities. [III:69. 71, 75, 122]

Some U.C., Davis graduates already prefer Dr. Ortega's residency progam to their alma mater's post-graduate psychiatric training. Modem linkages excluding UCD would keep it behind as a second-class training program for good. [III:137 - 138, 142]

The then Acting Deputy Director of State Mental Hospitals was on academic

leave from his position as UCD Director of Residency Training and had been pushing hospital research.

Dr. O'Connor's immediate predecessor as hospital director (Dr. Linn) testified on Dec. 30, 1981, about the then UCD Director of Residency Training:

> "Well, I do recall one incident at, when he was working for University of California at Davis, involved with obtaining funds for their training programs that he admitted to me that informally that his main purpose was to obtain sufficient money from residency programs throughout the State to keep his own training program going." [V:35]
>
> (The Acting Deputy Director never became more than Acting Deputy Director.)

i) On June 19, 1981, Dr. Ortega placed a resident, Dr. Vaughn on a month's leave of absence or less, without pay, effective 7/1/81 (he would automatically be terminated if he was A.W.O.L for five consecutive days). He had been reluctant to return to his medical rotation in Oakland's Highland Hospital to

compete with younger doctors, and had used up his sick leave to recover from recent irregular heart-beats. He continued to attend some of Dr. Ortega's training sessions, but he was told he should be in his assigned rotation if he wanted to get a medical license in California [IV:57/25]. (He had lost his first automatically on conviction of fraud 8 years ago. [I:47])

j) On July 17, 1981, he received a small stipend for July and a notice that his leave expires in six months or 1/8/82 instead of 8/1/81 and that he must see Dr. Ortega if he wanted to return earlier [4]. Dr. Ortega told him the expiration date was a typographical error but he must return the check. [I:52]

His wife's boss who is a lawyer wrote the hospital, claiming he had not intended to be away for six months, and should be paid in full [3a, IV:54]. Dr. O'Connor's subordinate (Mr. Donoviel)

talked to Mr. Friday's Personnel Officer (Mrs. Owen). Between them and without authorization, they reinstated Dr. Vaughn in exchange for Dr. Vaughn orally expressing misgivings about residents contributing to get a computer. (He was not asked to contribute by the other residents. [I:58, 98, III:104])

Dr. Vaughn testified on 10/29/81 that he waited while Mrs. Owen and Mr. Donoviel talked:

> ". . . He asked me if -- if I would allow him to proceed (sic) me in speaking to Mrs. Owens about five minutes, and I said certainly and so he proceeded me talking to Mrs. Owens. And then I went in and Mrs. Owens could not have been more polite, . . . and told me not to be alarmed; that they had a way of dealing with this and that I would receive my check in very short order." [I:55/24 - 56/26]

Mr. Donoviel himself testified three months later, on 12/29/81, that

> "I suggested that Dr. Vaughn go directly to Mrs. Owen about his complaint of not being paid for I believe it was a month's service.

And that event, that package, tripped off further comments about your conduct and that led to the investigation." [IV:40/14 - 41/18]

(Hearing reporter omitted "deal" after "package".)

Non-parenthetically, Mrs. Owen has since asked to "retire". (Then Mr. Rubin sought to dismiss petition for writ of mandate to reinstate Dr. Ortega because she had "retired".)

k) On Wednesday, 7/29/81, Mrs. Owen reported [7] to Dr. O'Connor that Dr. Vaughn "felt the decision not to allow him to change his rotation period and work here during the month of July was a way of reprimanding him." (The official hospital investigator's vacation was to start the following Friday, 7/31/81.)

Dr. Vaughn testified three months later that this was "pure speculation on my part" and when recalled to the witness stand on the afternoon of 10/29/81 -- (after Dr. Ortega had postponed cross-examining

all witnesses pending full discovery,) -- would go no further than "I wondered what would be the consequences of not making said voluntary contributions". [I:58, 98]

1) Dr. O'Connor asked to see Dr. Ortega on 7/30/81 and he arrived just as the UCD Acting Chairman, Psychiat. Dept., was leaving. Dr. O'Connor asked Dr. Ortega to go on a week's unpaid administrative leave from July 31, 1981 while the charge of coercing his residents to buy a computer can be investigated. (His salary for that week will be reimbursed if the charge was groundless.)

(The Notice of Punitive Action [vii] did not charge coercion and no one testified that there had been, vs. "Finding" VI [ix].)

UCD had just lost its federal training grants and wanted unspent and uncommitted state funds. Dr. Ortega did not want to refuse their assistance in

training or research as redundant because his residents have arranged computer access to other universities. Fewer questions will be raised if he was on vacation rather than administrative leave and Dr. O'Connor agreed. (Dr. Ortega was in effect spending his own money to keep his budget untouched.)

On Nov. 16, during Dr. Ortega's cross-examination [II:126], Dr. O'Connor remembered:

> "You thought that it would not look good, in light of the university and so on, and you asked me instead of going on administrative leave, would it be permissible to allow you on vacation . . . for two weeks. . . I was initially talking about a period of about a week."

After offer of proof that the hearing officer insisted on, Dr. O'Connor admitted [II:80 -82] that

> "I do recall talking to you that I was concerned because the person that I had talked to -- I'm not sure if it's important to mention his name -- was, in fact, the person -- I don't want to personalize -- (who) had tried to cannibalize our program in the past."

On further questioning, he reported that

"(S)ome of the positions were taken away from us, and we're now developing tactics, which I hope don't go outside of the room at this time, to gain some of the money that was stolen from us by the university".

(That UCD Acting Chairman, Psychiat. Dept., is no longer its Chairman.)

3) Later, the hearing officer apologized to Dr. O'Connor for allowing a lengthy cross-examination! Later on, and prematurely -- (and permanently) -- he "excused" Dr. Laskay to call Dr. Ortega for cross-examination himself!! [III:21 -22]

(It was Dr. Laskay who testified from memory [II:168 - 170] on 11/16/81 that Dr. O'Connor had forgotten he had signed the thank-you note to the printer's donor, that they searched Dr. Ortega's office and "among other things, yes" they were "looking for instances of

forgery". [15a-1!])

m) Dr. Ortega protested [VII:76, 137] against the investigating team including Mr. Friday and Dr. Laskay, whose application he had initially turned down unless he started training without a stipend. Dr. O'Connor thought that the team may be irregular but that Dr. Laskay was O.K. [IV:54 - 55]

n) After telling Dr. Ortega's residents that he went to all out-of-town rotations even if he did not care to commute, Dr. O'Connor said that, for the first time, two people had complained about Dr. Ortega in writing. [T-2,3] There will be an investigation of his management practices for a week, but Dr. Ortega will be away on a two-week vacation. [R]

o) The Chief Resident, Dr. Gandhi, declared in her affidavit to District Court that Mr. Friday was talking to Dr. Ortega's secretaries when she arrived at

Napa on Friday, July 31, at 0800, telling them [T-2] that the locks had already been changed (even before Dr. Ortega was officially on "vacation").

p) Two weeks from that Friday, but effective the following Monday, Dr. O'Connor extended Dr. Ortega's leave indefinitely with the option to continue on "vacation" [S] if he wishes.

(Dr. Ortega was therefore not under any obligation to be away from the hospital even on Aug. 16, 1981.)

He stopped by Saturday, Aug. 15, to bring the computer home to use. His Napa office key did not work, but the computer room's lock had not been changed. (It turned out that Mr. Friday had been reading Dr. Ortega's old love letters that he keeps locked in a drawer in a locked desk in his Napa office. [Deposition, p. 26])

q) Napa knew that Dr. Ortega took the computer home every week-end, but Mr.

Friday took the serial number to the District Attorney's office for a court order to bring it back to the hospital. Since it was not hospital equipment, his leaving the computer room unsecured did not embarrass Dr. Ortega. (But it should embarrass petitioners who claim it is their job to secure what is being investigated and must lock up the "evidence" even if no resident alleged coercion to get the equipment.)

r) On Aug. 28, 1981, Dr. O'Connor called Dr. Ortega to say there were serious charges against him that he did not want to go into specific details about over the phone, but that Dr. Ortega can opt [II:83] to resign. Dr. Ortega refused with a laugh and Dr. O'Connor withdrew his promise to discuss the matter personally, in violation of the State Supreme Court decision in Skelly v. State Personnel Board (1975) 15 C2d 194:

"6. Preremoval safeguards for a

permanent civil service employee must include as a minimum, notice of the proposed action, the reasons therefor, a copy of the charges upon which the action is based, and the right to respond, either orally or in writing to the authority initially imposing discipline." [II:1, 66-67]

s) Dr. Ortega had then asked to see Dr. O'Connor's own superior in Sacramento by writing [N] to the State Personnel Board (SPB) on 8/31/81, to protest his dismissal without written notice.

4) Instead of referring his letter to the Secretary of Health and Welfare which the SPB chart of grievance channels [xiv] shows is the next step if a grievance is unresolved, it deliberately misinterpreted Dr. Ortega's protest about unwritten charges as an appeal [N-1] against a carelessly padded [I:89] Notice of Punitive Action [vii], dated 9/14/81, effective 9/22/81. (A two-week notice would have taken it to 9/29/81.) Hearing was hastily set

for 10/29/81, before Dr. Ortega can ask the court for an order to discover documents that had not been received in 30 days:

> Calif. Admin. Agency Practice, 1970, Sec. 2.41, p. 82, PROCEDURE FOR INVOKING DISCOVERY: "Theoretically, the hearing could be set before the expiration of the 30-day period in which a request for discovery could be made. However, in practice this rarely occurs because the calendar of the Office of Administrative Procedure is such that most hearings are set 60 to 90 days after service of the initial pleading. An additional pleading might be filed less than 15 days before the administrative hearing, in which instance a party might be entitled to a continuance to allow him the full 15 days in which to request discovery."

t) Dr. Ortega asked Napa [X,Y] in writing to return all his personal property, but was ignored.

u) The week before the hearing, Dr. Ortega received an anonymous phone call warning him that he could default in the hearing if he were arrested for Medi-Cal fraud and cannot obtain a "good cause" continuance. He asked the court [L] if he

could be released on habeas corpus if that happened. It did not, if only because it would have been a false arrest. Otherwise, the caution was well taken:

> Govt. Code Sec. 19579: Failure of the employee to appear at the hearing shall be deemed withdrawal of his answer and the action of the appointing power shall be final.
>
> (But it is obvious [xxi] that Dr. Ortega's medical files are still being "re-searched".)

v) On October 20, 1981, counsel for Napa (and now for the State Personnel Board in Dr. Ortega's petition for writ of mandate for reinstatement, Mr. Rubin), acknowledged [W, I:91] illegal search of papers.

> "All of them are available for your inspection at the hospital. We must respectfully deny your request however that any of the documents be suppressed or returned to you."

w) On Oct. 23, Dr. Sutton wrote the hearing office protesting Dr. Ortega's dismissal. (Appendix A, [P]).

B. HEARING CONTROVERSY AND ERRORS

5) Before the hearing was called to order on Oct. 29, 1981, the hearing officer, Mr. Waller, who is also Chief, Hearing Office, SPB, was heard [M] to predict, "Oh, we have what we need here, this won't take long".

6) Another charge [vi] was substituted to amend the Notice of Punitive Action on the eve of the hearing, and Dr. Ortega asked for a continuance but was refused and promised he could call all the witnesses back instead. Appendix C (App-11), [I:7, 37, 43, 79, 90, 121-4].

7) Another charge was dropped [I:9 - 11] and by noon it was obvious that the hearing was not going the way it was supposed to go. Chief Hearing Officer Waller spent the lunch recess [I:71] changing other hearing schedules so that Napa's can resume on 11/4-5/81.

(When Dr. Ortega was told that the hearing would resume in a week, he

decided [I:80, 88] he can wait that long to cross-examine the rest of day's witnesses.)

8) Mr. Waller found out that Dr. Ortega had petitioned the court for discovery and proclaimed [I:80], pounding the table for emphasis, that "This hearing is discovery", and then started scribbling notes while barely attending to the proceedings. (What inferences are invited?)

(He must be summarizing the morning's findings. He did not remember well enough: the last complainant was a student [vi], not the social worker he cited in his Proposed Decision [ix]. Unless he wanted to extend to her the protection against sexual discrimination between employees in order to dismiss Dr. Ortega who is not even her supervisor. She had graduated years before the hearing [I:39] and was not employed

at Napa. Which the unsubmitted Notice of Punitive Action [vi] would have told this Court.)

x) On Oct. 30, 1981, over the week-end before the court hearing on Dr. Ortega's petition for full discovery, he got another letter [JJ-2] from Mr. Rubin, telling him that he had "evidence" from Dr. Ortega's papers to counter any testimony of support from Dr. Sutton:

> "If you intend to introduce that document we will be compelled to offer rebuttal evidence which is in our possession. Because of your tardy response to our request, we have been unable to ascertain which documents will be needed to counter Dr. Sutton's declaration. In the interest of fairness, however, we are hereby informing you that we do have relevant evidence bearing on Dr. Sutton's credibility and we do intend to use it should it be necessary. Finally, if you do introduce the declaration of Dr. Sutton, please so inform us by telephone so that we can subpoena her for cross-examination."

(Dr. Sutton was Chief Resident during Dr. O'Connor's senior year as psychiatric resident, and Dr. O'-

Connor told her before dismissing Dr. Ortega by phone, "I always thought you were in love with Dr. Ortega." On his cross-examination of Dr. Sutton, Mr. Rubin's "rebuttal" consisted of [17] her semi-nude photograph as a model, [18] a self-composed Valentine Card, and [19] a classic book of poetry about love that she had sent to Dr. Ortega 10 years before.)

The judge who heard Dr. Ortega's petition for discovery, expressed doubt about how a picture [17] of the witness could "rebut" her assessment [P] of the sustained effectiveness of Dr. Ortega's training program.

y) The court ordered on Nov. 2, 1981 that [H] missing documents and all investigative notes as well as Mr. Rubin's "rebuttal" evidence be furnished Dr. Ortega.

9) That same morning, Mr. Rubin asked for

a continuance [II:3]. Mr. Waller reworked time slots without any consultation with Dr. Ortega and granted Mr. Rubin a miscontinuance. A newshound heard about it from Mr. Waller and told Dr. Ortega when he called him to ask how he will defend himself from what Mr. Waller heard on the first day of the hearing. The date was already set when Dr. Ortega went to the Hearing Office to request subpoenas [JJ-3] in his handwriting for 11/4-5.

10) Despite repeated written requests, not a single subpoena was issued [II:143], in violation of Govt. Code Sec. 19851:

> "The board or its authorized representative shall issue subpenas for witnesses for the employee upon his written request and at his cost. The board or its authorized representative may request such costs to be prepaid."

11) Two weeks after the court ordered discovery, Mr. Waller talked Dr. Laskay [II:150] into testifying from memory, after Mr. Rubin told Mr. Waller that the

law does not intend for his notes to be shared even if the court ordered it.

(Months after Dr. Laskay died, the Attorney General sent his notes to petitioners' Federal District Court Judge. [First Amended Petition for Writ of Mandate, p. 31])

12) On Nov. 17, 1981, Dr. Ortega's cross-examination of Dr. Laskay was interrupted with Mr. Waller asking Mr. Rubin if Dr. Laskay was their last witness. When Mr. Rubin confirmed that "that concludes our case", Mr. Waller excused Dr. Laskay with "I think he has testified long enough". [III:21 -22]

13) Even after Mr. Rubin said they had "completed our case", Mr. Waller still felt the need "to identify what are the real issues in this case". He did not ask Mr. Rubin to re-open his case but called Dr. Ortega as his own witness [V:96] and suggested questions to ask as Mr. Rubin cross-examined him, at his

suggestion, in violation of Evidence Code Sec. 776:

> "(a) A party to the record of any civil action . . . may be called and examined as if under cross-examination by any adverse party at any time during the presentation of evidence by party calling the witness." (The wording is clear.)
>
> (The umpire, who had specifically cited Evid. Code Sec. 776 as his excuse, thus identified himself as an adverse party. Cf. Appendix B, [IV:3 - 9].)

Dr. Ortega was cross-examined despite his protest [III:21 - 25] that his own witnesses were waiting to testify.

z) Acting as his own counsel, Dr. Ortega forced Napa to produce [III:48 - 51] after an unscheduled recess the computer training contract that was approved for twice the amount requested in the one that was withheld from processing. (This thus contravenes Mr. Waller's "finding" that Dr. Ortega was

extravagant. See also App-3, Dr. Sutton's declaration, par. 2.)

14) Mr. Waller kept postponing the time to call state witnesses as Dr. Ortega's, and then finally refused to subpoena anyone or even call to the stand those who were on hand who had previously testified, including Dr. Gandhi, the Chief Resident that year. Appendix C. (Dr. Gandhi, pre-empted as state witness [I:90] as soon as Dr. Ortega postponed cross-examinations that first day of the hearing, mocked poor Mr. Rubin [I:95] and was denied as Dr. Ortega's last witness. App-14 [V:91].)

15) When Dr. Ortega took the stand himself to testify on 12/30/81, he was again interrupted [V:110 - 111]. Mr. Waller found it

> "a(n) intolerable burden, no question and answer format, which is the normal procedure for taking testimony for a hearing reporter, I'm going to give you an opportunity to

put your testimony in writing, and then I'm going to take a look at it and Mr. Rubin can take a look at it, and then we'll reconvene for the purpose of cross-examination, if any." (What is being telegraphed?)

16) Dr. Ortega was promised that his written testimony would be copied and distributed to all who have been faithfully attending the hearings, but ordered in no uncertain terms to submit his testimony in writing over his objections (and suggestion that someone ask questions [V:110] which he will write out.

Hearing Officer: . . . When I receive th testimony in writing, then I'll set an additional hearing date at which time we limit the hearing to Cross Examination, if any, and rebuttal testimony, if any.

Dr. Ortega: And (re)rebuttal?

Hearing Officer: Yes, but (re)rebuttal is limited to what's presented on rebuttal. We're not reopening this case.

Witness: I understand that. I understand that.

Mr. Rubin: Mr. Hearing Officer, Dr. Ortega --

Hearing Officer: Perhaps we can handle this off the record.

Mr. Rubin: Yes, sir. [V:111]

17) Off the record, the decision not to (i) rebut now or (ii) rehear later (or re-open their "can of worms") was forged. (One now sees the subterfuge. [VI:2 - 5])

(For an earlier example of unmistakable collusion, see Appendix B. [IV:3 - 9])

i) Mr. Rubin asked for a postponement of the hearing before it resumed on Feb. 16, 1982 [viii], but Mr. Waller advanced it instead to Feb. 2, 1982, and could only distribute the copies of Dr. Ortega's testimony just before the hearing was called to order. Dr. Ortega went back to the witness chair but Mr. Rubin did not have any cross-examination questions. As Dr. Ortega was about to complete his testimony and present more exhibits in evidence, Mr. Waller hur-

riedly adjourned the hearing. (His court reporter had already started packing as soon as Mr. Rubin said he had no cross-examination questions.)

> "Well, I think what I'll do in order to be fair to both parties, or at least attempt to be fair with both parties is, we'll consider the testimony concluded; however, I'll hold the record open for another fifteen days and at that time you can submit all of the exhibits or any additional testimony that you want to present, Dr. Ortega. And I'll request that you give a copy of it to Mr. Rubin. At the end of fifteen days, I'm going to consider the record closed. At that time I'm going to prepare a proposed decision for the California State Personnel Board. The decision will be in writing; the decision will contain findings of fact; the decision will be mailed to all the parties; and it will be the decision of not just the Hearing Officer but it will be the decision of the California State Personnel Board. And under those circumstances, I'll consider the case submitted." [VI:4-5]

Dr. Ortega was left on the witness chair waiting to testify (he had already been sworn in before [V:95 -96]).

ii) The decision of the Board was then expectable around the end of February,

since the Board has ten days to distribute the Proposed Decision before acting on it, under Govt. Code Sec. 19582 (b):

> ". . .A copy of the proposed decision shall be filed by the board as a public record and furnished to each party within 10 days after the proposed decision is filed with the board. . ."

The hearing officer who seemed to be in a hurry (App-34) to finish did not file his Proposed Decision [ix] until March 8, 1982, but it was not distributed at all. The Board adopted [x] the Proposed Decision on March 17, 1981.

It would not have taken much to drop a copy of the Proposed Decision in the mail. Why were the explicit provisions or implicit intent governing Disciplinary Proceedings disregarded? The answer is not hard to find.

In the Notice of Punitive Action [vii] that petitioners did not submit, there was (App-21) no charge that Dr. Ortega

was arrogant or coercive, no allegation that money was spent that had not been approved or allocated, no complaint of threats to supervisees, female (A-23) or ex-con. Yet Dr. Ortega was dismissed for being arrogant (A-30), abrasive (A-29) yet deceptive, coercive (A-31) and extravagant (A-3), discriminating on the basis of sex, and retaliatory towards an ex-con (A-32, -33). [I:58, 71, III:74, VII:173, 445-462]

In preparing to petition for a rehearing, Dr. Ortega found the record had not yet been transcribed and could change the mind of the Board. Especially after another hearing officer suggested getting a lawyer, which cost half Dr. Ortega's withheld salaries. But even then, a rehearing was denied. Puzzled, Dr. Ortega studied the record [IV:19] of denied petitions for rehearings and found that non-Caucasians charged by Caucasians with sexual

harassment and heard by miscegenophobes never even got a proper hearing. (Caucasian miscreants got off with counseling, even if their victims were non-Caucasians.) With little left afterwards for legal assistance in frivolous court skirmishes (Appendix G), it is work-saving to the still employed and/or bigoted (App. E) to encourage petitions for rehearings.

The rest is as stated in petitioners' untruthful "Nature of the Controversy".

2. The Proceedings Below

Petitioners claimed in Federal District Court that the SPB decision was not appealed. It is still under appeal because of false findings (Appendix C) in the Proposed Decision appended by petitioners and the reversible errors (I - XIII) in the administrative proceeding itself (Appendix E).

In federal court, petitioners had opted for a summary judgment instead of the

jury trial demanded for Dr. Ortega. The trial judge did not find a "good faith" defense but decided, wrongly, that they met the Chenkin test. On Dr. Ortega's appeal (Cf. Appendix A for an updated brief), the Chenkin test was applied correctly. Petitioners lost.

For petitioners to assert that the Court of Appeals ruling in favor of Dr. Ortega was in conflict with other decisions (which it took into account in its "de novo" review) is either a misreading of their own old citations (iii - viii, below) or a frivolous, time- and money-wasting allegation to exercise petitioners' indefensible "right" to be heard just for the sake of the exercise. Please see paragraph #8 of (viii) Butz v. Economou, below.

ARGUMENT

[Dr. Ortega has not been able to find two decisions referred to in petitioner's argument that the Court of Appeals erred and must be reversed. They were not cited in the

proceedings below. Respondent is unprepared to counter any argument based on what is misreported as (i) MANCUSI v. DE FORTE (1968) 392 U.S. 364, and (ii) WALLACE v. CHAPPELL (9th Cir. 1981) 661 F.2d 719. He hopes that California statutes cited herein and in state court petition for reinstatement, with which petitioners are familiar, will make up for his ignorance and submits them instead for their rebuttal.]

All the decisions (iii-x below) listed by petitioners speak for themselves, in paragraph after numbered paragraph (all true relevance to the instant case are added inside parentheses or in the following paragraph), against their arguments that a writ of certiorari should be issued as automatically their due.

I

VERY BAD CASES MIGHT MAKE BAD LAWS

GOOD CASES SHOULD MAKE GOOD PRECEDENTS

INTRODUCTION

"A man's feelings are as much a part of his personality as his limbs." Dean Pound in 28 Harvard LR 343, 363.

Dr. O'Connor depended on his co-petitioners as appendages, and Dr.

Ortega on his trainees for a third ear. On Sept. 2, 1981, when the residents and faculty as a body protested Dr. Ortega's peremptory dismissal, Dr. O'Connor told them that (1) he hopes he will still be invited to Dr. Ortega's house in the future but that (2) Dr. Ortega will never be able to come back to the Professional Education Department, (3) Dr. Ortega will lose his retirement benefits for refusing to resign, and (4) Dr. Ortega will need to go to the Supreme Court to be reinstated. [T-1, -2, -3, IV:60]

Dr. O'Connor was delivering a covert message which was transmitted that (1) his hands may be tied, but (2) having heard Dr. Ortega say that he expected to die like his father from a stroke, he has little time left to fight, (3) the unwritten charges will be a virtual indictment for fraud which would automatically

disqualify Dr. Ortega from receiving his employer's contribution to his retirement pension (which was why the Notice of Punitive Action [vii] did not charge coercion at all, since forcing rules out lying), and (4) that it costs the hospital nothing at all to take the case all the way to the Supreme Court.

(Dr. Ortega will therefore now throw himself at the mercy of this Court and only argue against what petitioners have presented below as precedents in their favor to prove that their exercise of their right to a review is frivolous.)

II

PLAINTIFF'S EXPECTATION OF PRIVACY IN A GOVERNMENT OFFICE WAS REASONABLE, HAD BEEN RESPECTED FOR ALMOST TWO DECADES AND COULD NOT HINDER WHAT PETITIONERS SAID THEY WERE OFFICIALLY INVESTIGATING

The law has evolved slowly but steadily from physical protection of person and property rights to protection of personal liberty, including the free-

dom to be let alone.

iii) WILLIAMS v. COLLINS (8th Cir. 1984) 728 F.2d 721:

> 6) Denials of absolute liability to government officials are appealable when entitlement to immunity are sufficiently free of fact question as to present question of law.

The instant case, even with petitioner's sterilized and incomplete version of the "Nature of the Controversy", is not sufficiently free of fact questions. (A-1, Essential Lies, etc.)

> 10) Defendants were entitled to absolute immunity only for common-law liability for defamation, search (not seizure [17-19]) reasonably calculated to help investigation or simple inventory of material was within line of duty and defendant's had duty to investigate and remove employee if necessary.

The duty to remove any permanent employee must be for cause and exercised with care. The duty to investigate any charges of forgery and fraud mandated the use of the official Napa investigator (who just happened to be on vacation the very week that Dr. Ortega was

forced to take his), who was a specialist duly assigned to the hospital specifically to investigate such matters [V:42]. The reason for such detached assignment is precisely to disinvolve interested amateurs, especially those who had any untoward resentment (e.g. Dr. Laskay [III:111]), or against whom had been lodged an earlier grievance (i.e., Mr. Friday). [VII:76, 102, 147, 165, 173] The professional investigator is required to supervise everything from the start, especially if administrative leaves are involved, with or without pay. App-34. (Instead, Mr. Friday bossed other amateurs. Dr. O'Connor tried to get a legally trained and experienced administrator/alienist but he was outvoted by his co-petitioners.) [V:47]

iv) UNITED STATES v. NASSER (7th Cir. 1973) 476 F.2d 1111:

> 18) Circular was not directed at surveillance in course of internal investigations.

In the case before the Court not even a circular was available to support ad-hoc policy of taking "inventory" when peon was still employed.

v) UNITED STATES v. COLLINS (2nd Cir. 1965, not 1963) 349 F.2d 863:

> 5) Court properly relied on ruling made on motion to suppress where no other evidence had been offered to suppress on ground that search and seizure of defendant's work jacket was unreasonable.

Petitioners seized everything [W, JJ-2] and presented old souvenirs [17-19] as "evidence" against respondent's witness.

> 6) When defendant was handling valuable mail for which government was responsible, search of defendant's desk was constitutional exercise of power of government as employer to supervise and investigate performance of customs employee.

The computer during weekdays was housed away from Dr. Ortega's office in the hospital. Dr. O'Connor was trained by Dr. Ortega and has insufficient experience to supervise Dr. Ortega's performance. (Dr. O'Connor, in fact,

asked other faculty in Dr. Ortega's program to evaluate a copyrighted manuscript that has, to date, not been returned to Dr. Ortega. His faculty, as might have been expected, refused to abridge academic freedom to teach what may not yet be written up elsewhere.)

[Ms. had not been word-processed and had to be reconstructed mostly from memory.]

9) Room in which defendant's jacket was hung was his supervisor's outer office, which was public area not shown to be segregated for private purposes from other work areas.

Dr. Ortega's office lock had to be changed to exclude him and facilitate search before he returned from "official" vacation [T-2] and before he fetched the computer (from another office which can be opened by all the residents), as he usually does on weekends. [S] (Napa knew that, claimed to be concerned about "evidence", but did not secure the computer against removal. Was this an amateurish attempt at

entrapment to charge Dr. Ortega with "stealing" his own equipment or with obstructing justice, by secreting "evidence"?)

10) Where the jacket glowed because of detection dye, agents had "probable cause" to suspect defendant and arrest him.

Dr. Ortega was not suspected of taking the computer. (He told his secretary [10] he had it at his office at home.)

12) Customs agent had authority to demand of any person within 3 miles, necessary assistance in making arrest, search and seizure.

Hospital investigators delivered by hand to Dr. Ortega's office at home a memo dated Aug. 14 [S], extending his administrative leave indefinitely effective Aug. 17, the same morning his secretary had told them Dr. Ortega called to ask whether he had appointments that morning, and that [10] he had the computer over the week-end. (No questions were asked about the computer, only that Dr. Ortega would be expected

to answer questions in the course of the extended investigation. Dr. Ortega's permission or his cooperation was not solicited in making their secret "inventory" of his papers, since he was not yet dismissed.)

vi) SELLARS v. PROCUNIER (9th Cir. 1981) 641 F.2d 1295:

> 3) State parole board officials enjoy some degree of immunity as political appointees of the Governor.

None of Napa officials sued are political appointees. They are all employees who had to compete in examinations to be appointed. All state employees past the six month probationary period after passing the competitive examinations can be dismissed only for cause. (The search did not discover cause for dismissal.)

> [Parenthetically, this also means that if Dr. Ortega were the appointing power for Dr. Laskay (whom Dr. O'Connor made acting medical consultant), or for the complainants of sexual harassment (neither of whom was a regular employee), he

could dismiss them over something trivial and not be held accountable for discriminatory practices, fantasied or factual. (Dr. Laskay suspected that he was initially turned down by Dr. Ortega for being a homosexual. Dr. Ortega denies their allegations and they are not supported by any one else. [VII:102, 137, 173, 453 - 462])]

4) State parole board officials perform functionally comparable tasks to judges.

Dr. O'Connor cannot judge Dr. Ortega's performance. (He even admitted, once, after the hearing, that he had "no right to oust Dr. Ortega".)

vii) HARLOW v. FITZGERALD (1982) 457 US 800:

4) Under "functional" approach to immunity, immunity of government officials extends no further than its justification warrants.

Inventory-taking does not include seizure and expropriation of private property in violation of the Fourth and Fifth Amendments. [I:91, W, JJ-2, 17-19] (Once qualified immunity is denied, actual damages must be automatic, only punitive damages to be assessed by a

jury.)

8) Qualified or "good faith" immunity is affirmative defense that must be pleaded by defendants.

Petitioners' simple assertion cannot persuade when actual conduct was an exceptionable display of "bad faith". (And defeat of "good faith" defense should render victim immune from frivolous petitions to review the issue before a jury.)

viii) BUTZ v. ECONOMOU (1978) 438 U.S. 478:

7) All individuals are subject to federal law. Officials must bear the burden of showing that public policy requires exemptions of that scope.

The burden does not imply the right to appeal when the showing was not persuasive to the lower court.

8) This burden, when discharged, entitles them to qualified immunity, except where it is demonstrated that absolute immunity is essential for the conduct of public business.

The burden must be discharged, and only then can the decision be appealed

in order to be granted absolute immunity. (Petitioners failed to prove entitlement to any immunity, and that is why no claim for absolute immunity can be or is being advanced.)

ix) CHOCALLO v. BUREAU OF HEARINGS AND APPEALS, SSA (E.D. Pa. 1982) 548 F. Supp. 1349:

> 19) When sole purpose of search of offices was work-related and reasonably forseeable by plaintiff who had refused active efforts of her supervisor to locate and remove case file, which was government property, . . . two administrative law judges . . . entering and searching former administrative law judge's office to obtain file did not amount to violation of former law judge's Fourth Amendment rights. U.S.C.A. Const. Amend. 4.

What was removed was not work-related. The search was covert. Mr. Friday in his deposition [p. 26] admitted going to Dr. Ortega's office after office hours and poring over his files. Dr. Ortega does not know what in his files would keep Mr. Friday reading for hours but old love letters in locked files probably opened by the same locksmith who

changed the door lock. (Mr. Friday's curiosity is very curious. There was no reason to change Dr. Ortega's office door lock before the secretaries arrived at 0800 hours. [T-2])

> 24) When director communicated to plaintiff the basis for non-promotion was discipline-related, director had authority to recommend adverse action for plaintiff's actions which were deliberate impediments to execution of delegated authority, although director erred in not processing plaintiff's promotion or grade increase.

CSPB rules, in fact, require progressive disciplinary measures before disapproving salary increments. No such scenario even approaches the capricious investigation and arbitrary administrative leave against specific provisions of California Govt. Code Sect. 19574.5 limiting unpaid leave of absence to 15 days and only for:

> "misappropriation of public funds or property, drug addiction, mistreatment of persons in a state institution, immorality, or acts which would constitute a felony or a misdemeanor involving moral turpitude".

[II:85 - 88, V:17, 47-48]

(Moral depravity was never charged, but could be lodged against petitioners, with their many legal perversions.)

> 26) When plaintiff did not indicate what documents, if any, were improperly collected and disseminated, nor indicate manner in which defendants collected such data, complaint of violations of Privacy Act that were not relevant and necessary . . . was subject to denial. (Undeniable in instant case. [17-19])

Dr. Ortega's medical files of private patients were scrutinized, even old files of out-of-state patients used for teaching residents, and rumor was leaked out into the medical community [xxi] just before the hearing that Dr. Ortega would be arrested for Medi-Cal fraud. (More sophomoric than this "brief" is the Notice of Punitive Action [vii] as a thesis on fraud, without calling it that in order to keep the disposition in the hands of the State Personnel Board. App-21.)

Not only was second use of information

prohibited by California's own Privacy Act, its Govt. Code Sec. 11183 also provides that:

> "Except in his report to the head of the department or when called upon to testify in any court or proceeding at law, any officer who divulges information acquired by him from the private books, documents or papers of any person while acting or claiming to act under any authorization pursuant to this article -- (Article 2. Investigations and Hearings) -- in respect to confidential or private transactions, property or business of any person is guilty of a misdemeanor and disqualified from acting in any official capacity in the department".
>
> 29) Any liability for violation of Privacy Act rests only upon agency and not individuals.

(That the amateur investigators automatically disqualified themselves can be pursued in California State Court.)

Yet petitioners' conduct does not only violate the Federal Constitution but offends and shocks the conscience [xxi] of concerned Bay Area citizens, who warned Dr. Ortega of his rumored impending arrest.

x) CHENKIN v. BELLEVUE HOSP. CTR. N.Y.C. ETC. (S.D. New York 1979) 479 F.Supp.

1349:

1) Does the person claim a reasonable or a legitimate expectation of privacy that has been invaded by government action? (The Court of Appeal said "Yes".) Did the individual's conduct evince an actual, subjective expectation of privacy? (The Court of Appeals said "Yes".) Is that expectation, when viewed objectively, justified under the circumstances? (The Court of Appeals said "Yes".)

2) Even in airport lobbies, people still retain some justifiable expectation of privacy in their belongings.

Private and official cars parked on public property are not subject to search and seizure, absent compelling reasons, like hints about a hidden explosive from reliable terrorists. (Only then can an ex-con qualify as compelling. But Dr. Vaughn cannot. [I:52, 58, 71, VII:445 - 452])

4) Three factors are crucial to weigh private vs. public interest under the Fourth Amendment: (1) strength of public necessity for the search, (2) efficacy of the search, and (3) degree and nature of intrusion upon the individual. [W, JJ-2, 17-19]

The Chenkin test failed to exonerate petitioners in that (1) the computer was merely moved to another location which, in fact, was more secure in the eyes of its owners; (2) there was abject failure to protect anything at all and amateur investigators promptly gave up on "sorting out what was personal and what was state property", making inventory-taking, in fact, just another "ad hoc", "post facto" excuse for abuse of access; and (3) search ended with (a) seizure [W] and (b) storage [JJ-2] and (c) the second use of medical and confidential information to harass Dr. Ortega, and (d) the introduction of "tainted fruit" as evidence [17-19] against a witness who wanted to set the record straight.

III. THE ADMINISTRATIVE INVENTORY BY GOVERNMENT OFFICIALS WAS UNNECESSARY, UNREASONABLE, PREMATURE, INEFFICACIOUS, INTRUSIVE, AND VIOLATED PROPERTY AND PRIVACY RIGHTS PROTECTED SPECIFICALLY

BY THE FOURTH AND FIFTH AMENDMENTS.

There was no public property involved. [VII:438 - 444] And,inventory taking proceeded to seizure and re-ransacking for non-contraband material. (That's why the petitioners failed the Chenkin test.)

In Chocallo, there was a file missing. In the instant case, petitioners themselves [W] seized Dr. Ortega's own medical and confidential files (to muddy the waters, to harass respondent into resigning under duress and, with old souvenirs [17-19], to threaten blackmail [JJ-2] in order to silence innocent citizens).

There was no alarm about a missing computer [10] that did not belong to the hospital, nor about training records from universities and community mental health agencies through which residents rotated outside the hospital as the hospital became less varied in clinical

challenges for well-rounded psychiatric training [III:122]. The evaluation reports and examination results from all training centers were under the custody of the secretaries in locked cabinets in the lobby of the Professional Education Department. The computer training contract and correspondence were also on the secretaries' desks. (In fact, the charge of forgery was dropped because of the files the secretaries produced. [II:168 - 171].)

Finally, the Napa County District Attorney turned Mr. Friday down when he sought a court order to take back "missing" equipment, because they were not hospital property. (Offering their serial numbers do not establish ownership. [IV:9]) They were not listed as "stolen" or "lost" but merely discovered as "missing". And they were not identified as "missing hospital property" in the security police report but merely as

"missing property". And the report itself stated [10] that Dr. Ortega's secretary had informed the hospital that he had called (as usual) to tell her that he had taken the computer and printer over the week-end (as usual). (Dr. Laskay was reported to have received the news with glee, saying, "Now, we have got him." He was excused from further cross-examination before that could be verified or denied. [II:21!!])

IV. IF COURT OF APPEALS GRANTED THEM QUALIFIED IMMUNITY, PETITIONERS COULD/WOULD THEN APPEAL FOR ABSOLUTE IMMUNITY

Under the precedent set by Butz v. Economou (viii-8, above), petitioners must first prove, not merely assert, entitlement to qualified immunity.

Qualified immunity can only protect officials from harassment, not as harassers. The "good faith" motives of Napa officials were questioned in great

detail by the Court of Appeals panel, and never taken for granted, like petitioners claim with their footnote. (Otherwise, it would not have promptly turned down their application for stay of its decision while they decided on a "third bite" by petitioning for a writ of certiorari.)

The Court of Appeals decision will protect powerless citizens and require powerful officials to secure a search warrant before intruding on the privacy of the unsuspecting. (Especially that of a peon acting in good faith, whose honesty has never been doubted before. [III:129 - 132, 140])

Of course, no court in the land would deny any lawful officers of government a legal warrant for search and seizure that is not a "fishing expedition". Cannot "fishing expeditions" be reserved for Siberia and other primitive enclaves of "might makes right"?

CONCLUSION

This petition for writ of certiorari is frivolous, designed to, delay correction of reversible errors in dismissing Dr. Ortega over trumped up charges, and impoverish him who is already living on borrowed time. (There was no administrative crises that needed resolution, nor compelling reasons to abridge constitutionally protected liberties and widely recognized rights against search and seizure without a warrant just to secure access to private papers in a "fishing expedition" in search of self-incriminating evidence for unspecified and, in fact, unsuspected crimes.)

A system that cannot run its business without spot checks on its top managers needs to know more about how to choose managers, not more freedom to violate what the Bill of Rights protect. The state must enforce equity as well as

maintain order.

The only suspicion of inequity was raised and then promptly disowned by an ex-con [I:58, 71]. There was no disorder to quell in Dr. Ortega's department. His office was seized when its lock was changed [T-2] two weeks before he moved the computer and printer from another room used by all his medical residents to his office at home for the week-end [10]. That week-end, he was no longer on administrative leave without pay in order not to "encumber the investigation" [II:85], having offered to go on vacation one week longer than he was told it would last. [II:126]

[What follows can also be Appendix I.]

RECOMMENDATIONS

Begging the Court's indulgence, of the four appended decisions in the petition, the last three glossed over substantive issues, the nature of which must be decided by this Court of last resort to

check abuse of executive power abetted by quasi-judicial subterfuge.

Respondent herewith respectfully recommends the following suggestions for consideration and action, if acceptable: Three are reasonably solid and the fourth (single-spaced) unprecedented, but more likely to save tax-payers money and the judicial system's time and space (for filing shorter answers than this to fewer frivolous petitions and self-selected appendices, which excluded Notices of Punitive Action that got respondent into the clutches of the law for the first time in his life).

1) The petition for writ of certiorari should be denied. If the petitioners are concerned about the chilling effect of the Court of Appeals' decision on their ability to inventory government offices, equipment, and papers, there would already have been a policy to cover their tracks: Bureaucrats love to

dictate policy. If they still have none, what they are trying to accomplish is not for the foreseeable future but for the short-term, in their continuing effort to make Dr. Ortega regret that he did not quietly resign (until eventually he had to throw himself at the mercy of this Court.)

2) It is also respectfully recommended that if (i) petitioners will stipulate that the nature of the controversy was as listed in paragraphs "a" to "z" and number 1 to 17 above, and then buried by abuses I to XIII below (Appendix E), and/or (ii) their counsel of record in this petition re-examines the documents quoted herein and cannot dispute them with exhibits, then this Court further certify that not only petitioners, but Mr. Rubin and Mr. Waller as well, have committed injustice beyond abuse of discretion as officers of the court during Dr. Ortega's hearing of his appeal

against dismissal in (a) Mr. Rubin presenting and Mr. Waller accepting false documents as evidence (e.g., the unprocessed computer training consultant contract [16a], while withholding what had been approved [16b], effective July 16, 1981, three months before Notice of Punitive Action [vii]), (b) introducing and accepting "tainted evidence" [17-19] in an administrative hearing against a witness (Dr. Sutton), and (c) Mr. Waller refusing (1) to issue a single subpoena requested by Dr. Ortega [JJ-3, II:143]] or (2) to call as his witness [IV:7 - 9, V:91] those who testified before full discovery was granted by court after the hearing had already started. (If officials can plead absolute immunity, a peon and his witnesses must equally have unqualified right to get heard and not be legally abused by any player-umpire, miscegenophobic or not. [I:67, V:15, 19], Caveat, Appendix E.)

3) Finally, to avoid inadvertence, unwitting or not, and a further round of appeals, might this Court also instruct the Ninth District Court to inform its jury that considerations of qualified immunity cannot enter its deliberations in assessing damages for petitioners' (1) violation of the Fourth Amendment by their illegal search, seizure, storage, and (2) use of non-contraband material in their effort to blackmail respondent and a witness to withdraw evidence under the threat of self-incrimination proscribed by the Fifth Amendment?

4) a) Can petitioners start posting a bond to cover damages to be assessed by a jury after this Court denies their "good faith" defense, so that tax-payers do not have to pay for delays to consider whether they are going to try another round of appeals? Even the total accumulated salary that they withheld for six months from respondent might be sufficient to deter them, if it was equally divided among the three "et. al" petitioners, and withheld semi-annually as long as they continue to delay resolution of this controversy which tolls the bell for a career as surely as capital punishment does for a criminal.

(Cat's paw but not clawed, Dr. O'Connor had gravely warned Dr. Ortega's residents, who are trained to hear unspoken messages with a third ear -- (as cited in the Introduction to Argument herein) -- that justice delayed may be justice for the already dead.)

b) Hereafter, instead of uncommitted taxpayers, can all four petitioners be held liable for accumulating interest in respondent's back salaries, starting with the effective date of this Court's denial of their wanton petition, should respondent be reinstated as Chief of Professional Education thereafter?

Respectfully submitted,

Magno J. Ortega

Table of Content of Appendices follows.

Addendum: As an M.D., respondent would like to suggest that, like the biological immunity that protects our bodies, all transfers of sovereign immunity be absolutely relative, even if more expensive to the State.

APPENDICES (A-1 to 42 below) Pages

A. Essential Lies and Implications 1
Who is petitioners' medical resident?
B. How to Keep Facts out of Hearings 6
The legal abuses of absolute immunity.
C. Biased Rulings and False Findings 10
Fact-finders cannot be player-umpires.
D. Argument 20
E. Pseudojudicial Reversible Errors 24
Is counter-harassment miscegenophobia?
F. Conclusions 37
G. Other Recommendations 39
ADDENDUM 42

Petitioners' and Respondents' Exhibits:

[9b]: A-30
[13a,b]: A-18
[17-19]: A-1
[vi]: A-5, 11, 12, 27
[vii]: A:21-24, 27
[viii]: A-26
[ix]: A:12-13,26-28
[x]: A-26, 28
[A-000]: A-27
[D]: A-17
[E]: A-21, 28
[M]: A-20
[P]: A-2, 28
[JJ-2]: A-2, 5
[000]: A-13
[xv]: A-28
[xvi,a-f]: A-28

Record: Hearing [I-VI], Writing [VII]:

[I]: 4(24), 8(10), 10(28), 12-121(27), 37(24), 39(4), 43-44(5,24), 68(28), 71-72(5,11), 80(12,24-25), 88(12,24-25,28), 97,139(5)
[II]: 1(24), 3(11), 21(28,39), 49-50(18), 52(11,25,28), 67(24), 93(25), 101(6), 103(20), 127(25), 143(11,25,28), 150(12,24-25,28,39)
[III]: 9(20), 21-22(13,25-26,40), 23-142(28), 39(25), 74(37) 122(28), 126(37), 131(28), 137-138(17), 140(37)
[IV]: 3-10(B,8,27-28,31), 19(31), 54-87(28,31), 60(7,12,25), 91(14)
[V]: 4-109(28), 11-15(16,28), 41(34), 57(34), 67-73(16,28), 77(28), 82(35), 91(10), 96(25,28,40), 110(26), 110-11(19,26,28)
[VI]: 2-5(26)
[VII]: 370-507(19), 453-62(13,15), 523(37)

ORIGINAL DOCUMENTATION FOR REPLY ABOVE

Mr Friday's federal deposition, p26(50)

[3a]: 12;	[4]: 12;	[7]: 14;
[10]: 46, 56, 58, 61;	[13a]: 7;	[15a-1]: 8;
	[15a-2]: 5;	[15b]: 7;
[16a]: 8, 64;	[16b]: 9,64	[17-19]: 4,
[D]: 5;	[D-1]: 9;	27, 44,48,
E]: 5;	[H]: 7, 27;	52,54-6, 64
[J]: 6;	[L]: 22;	[M]: 24;
[N]: 21;	[N-1]: 21;	[P]: 23, 27;
[S]: 19,45-6;	[T-1]: 40;	[T2]: 18-19,
[T-3]: 18,40;	[W]: 23, 44,	40,45,
[X,Y]: 22;	48, 54-6;	51,61;
[JJ2]: 26,44, 48, 54-6;	[JJ3]: 28,64	[i]: 4
	[i-d]: 5	[vi]: 24-6
[vii]: 15,21, 35;	[viii]: 33;	[ix]: 15,25,
	[x]: 35;	35, 41, 64;
[xiv]: 21;	[xxi]: 23, 52-3	

[I]: 1,7,9-11,37,39,43(24-25), 47(12), 52(12,54), 55-56(13), 58(13,15,36,54,61), 67(64), 71(24,36,54,61), 79(24), 80(24-5) 88-91(21,23-24,48), 95(31), 98(13,15), 112(7), 119(8), 121-4(24)

[II]: 1(21), 3(28), 21(58), 66-67(21), 80-83(16,20), 85-88(52,61), 89-90(6), 93(10), 112(10), 126(16,61), 143(28,64), 150(28), 168-70(17,57)

[III]: 21-5(17,29-30), 48-52(9,30), 62(7), 69(10), 71(10), 74-5(10,36), 104(13), 111(43), 122(10,57), 129-32,(59) 137-8(6,10), 140(59), 142(10)

[IV]: 3-10(7,30,33-4,57,64), 19(36), 40-41(14), 54-55(12,18), 57(12), 60(40)

[V]: 8,36(6), 15(64), 17(10,52), 19(64), 47-8(43,52), 90-1(31,64), 95-6(29,34), 110-1(31-3)

[VI]: 2-5(33)

[VII]: 76(18,43) ,102(18,43,48), 137(18,48), 147,165(43), 173(36,43,48), 438-444(56), 445-462(36,48,54)

First Amended Mandate Petition,p.31(29)

APPENDIX-1

A. ESSENTIAL LIES AND IMPLICATIONS

It is clear that degrees of immunity cannot be decided if facts cannot be pinned down. It is therefore revealing when petitioners try to qualify somehow for qualified immunity by lying baldly.

Petitioners admit that "Three personal items involving a female medical resident were removed as relevant to the pending personnel investigation against the respondent." Her name now is Dr. Sutton, but the investigators could not have known that, from those "personal items". Her name as a resident was her ex-husband's. Only after she wrote the hearing officer could they re-search Dr. Ortega's personal property to steal those items. Since she was in the same graduating class as Dr. O'Connor a decade ago, what they selected were not work-related.

Why did petitioners bite [17-19] their "tainted fruits" yet keep hiding them?

APPENDIX-2

The implication of petitioners' selection of what they assert without explanation as "relevant" but that they cannot now be silent about is that they tried to buy Dr. Sutton's silence with [JJ-2] threats of legal blackmail. And that what the ex-"medical resident" had to say and [P] did write might be of present interest to this Court:

"October 23, 1981

Dear Sirs:

> Dr. Ortega has organized and directed an outstanding psychiatric residency training program that has produced many extremely qualified psychiatrists who now staff Dept. of Health and Dept. of Corrections institutions. . . . The quality of training given has enabled the graduates to treat the most difficult patients and to assume positions of leadership within the Departments. . . Finally, the rate of passage of specialty board examinations of the graduates has been excellent and has exceeded the rate of most other residency programs. . . . (I)t is totally inappropriate to fire him on the basis of the charges presented(:). . .

1) Allegations concerning the computer. I feel that it is not improper for residents or other em-

ployees to donate money to purchase equipment that they would like to use in their work or training which the state cannot provide. . . Furthermore it is always possible to disagree or refuse his suggestions.

2) Payment of consultant to train residents on the usage of computer. For at least the last ten years all consultants have been paid for a full days salary when they come to give a guest presentation. . . Many times travel expenses would far exceed the amount they are paid in the customary fashion...Dr. O'Connor and other hospital administrators have been well aware of this practice for many years.

3) Allegation that Dr. Ortega 'took home state property'. . . In the first place, Dr. Ortega's home has been regularly used by residents as an off-campus training site for at least ten years. . . Dr. Ortega designed the architecture of his home in order to facilitate group meetings and other training sessions.

4) It is alleged that Dr. Ortega deceived Dr. O'Connor into signing hospital requisitions to purchase minor parts for the computer. I feel it is Dr. O'Connor's responsibility as an administrator to review materials before he signs them.

5) Charges of sexual harassment. . . In these ten years I have never heard of any incidents of 'sexual harassment'.

In summary. . . These irregularities

that may exist are relatively minor when you consider the overall performance of Dr. Ortega and in no way justify the decision to dismiss him.

I hereby certify under penalty of perjury, etc."

Of course, they have to mention that she was involved, because it will "all come out in the wash", so to speak, and at least petitioners can say they had not been silent about her.

Petitioners had to identify her as "medical resident" because (1) to identify her by her name at that time (2) would raise awkward questions now about (a) re-ransacking what they did not have the right to seize, search and (b) store in the first place.

[If a wrongly worded warning can save criminals from any prosecution, surely wrongful acts can reverse dismissals.]

After this letter to the hearing officer, Dr. Ortega was additionally charged with having been importunate with a social work intern, who testified [I:39] it was more than three years

before [vi] the Amended Notice of Punitive Action was sent to Dr. Ortega (on the eve of the hearing). She was not even recognizable to him when she appeared to testify.

But the threat to desist, or else, came to Dr. Sutton (through Dr. Ortega) after the first day of hearing, when both charges of sexual harassment had already been heard (and Mr. Friday, Mrs. Owen, and Dr.Vaughn had testified, the last twice [I:139, 72, 44 and 97, respectively]). Dr. Sutton's own privacy had to be violated by violating another's to "rebut" her declaration and keep it off the record as a rebuttal to what the hearing officer, Mr. Waller had scribbled and preserved in petitioners' Appendix. As Mr. Waller's "defender" (and his master's voice [IV:5] in Appendix B hereunder), Mr. Rubin in the role Napa's counsel, sent Dr. Ortega [JJ-2] the following threat to convey to

Dr. Sutton:

"Oct. 30, 1981

Dear Dr. Ortega:

> . . . (I)f you intend to introduce that document we will be compelled to offer rebuttal evidence which is in our possession. . . In the interest of fairness, however, we are hereby informing you that we do have relevant evidence bearing on Dr. Sutton's credibility and we do intend to use it should it be necessary. . . Finally, if you do introduce the declaration of Dr. Sutton, please so inform us by telephone so that we can subpoena her for cross-examination.

Very truly yours,"

Above as below are immune legal abuses.

B. HOW TO KEEP FACTS OUT OF HEARINGS

Mr. Waller stopped Dr. Ortega asking constitutional questions of Dr. O'Connor about [II:101/15] WHEN he decided to use the photograph by ruling that they are personal and then "testifying" that only Mr. Rubin [II:101/18-19] decides WHAT is used and [II:101/23-25] "is handling this case as a legal representative of the department and he is a Deputy

Attorney General".

Which also implies that even during the hearings [IV:60] petitioners already had doubts whether they can prove "good faith". (All the petitioners are asking now is another chance to try proving it, with the blessing of this Court, at Dr. Ortega's expense. If the state can't prove "good faith", the Attorney General won't be any worse off. And there's always a chance Dr. Ortega would have a fatal stroke.)

The following also tends to cloud the need for any immunity for quasi-judicial hearing officers and the "prosecutors" -- (who are defending the state in administrative appeals against punitive action in California in civil service disciplinary proceedings) -- if the net result makes officers of the court co-conspirators. Neither needs protection from frivolous suits as much as the

victims of such a misalliance.

It is [IV:3-7] the beginning of the 4th day of hearing. The "prosecutor" is Deputy Attorney General Rubin, who was then counsel for Napa, now counseling the hearing officer, Mr. Waller, about how defensible his rulings will be when Mr. Rubin defends them before the State Superior Court, which he is now doing.

> Dr. Ortega: . . . I think there are precedents to show that a party can ask for his witnesses without being bound by the fact that they have been called by the adverse party before. As you will remember during Dr. O'Connor's cross-examination you limited him to what Dr. Rubin -- Mr. Rubin, wanted him to testify about and he only wanted to testify about one allegation in fact. I think I should examine him about directly what other matters besides those since it is on his authority that I'm being dismissed. Our relationship goes a long way, and I think that is pertinent to what has happened. He was a resident in my program, and I think what has happened between then and now are of relevance. I think the matter of relevancy should be decided after the witnesses responded to questions and then the Counsel can object.
>
> Hearing Officer: You wish to comment before I rule, Mr. Rubin?

Mr. Rubin: . . . (H)is attempts here to in a sense disrupt the proceedings by totally changing the rules shouldn't be sanctioned by you. And I would very strongly urge that you not permit this to be undertaken, and WE are confident that this record will stand up in any further judicial proceedings if that's necessary. And we're satisfied that despite the fact Dr. Ortega's representing himself and that appears to be a severe handicap for him, that you have done everything you could to protect his rights, to give him every opportunity. And as I, say we're confident that should WE be called upon to defend that at some subsequent proceedings, that the record is clear he's been accorded every possible protection.

Dr. Ortega: Mr. Waller?

Hearing Officer: Well, I'm not going to rule finally on that issue of recall at this time. I'm going to adhere to my original ruling this morning and that is that we will not recall witnesses at this time. . .

Dr. Ortega: I think it is a mistake to think of it as recall, because they have been called once, but called by their own Counsel. I'm calling them for the first time, so this is not recall.

Hearing Officer: Well, I don't care to discuss that issue further at this time. We'll discuss it, as I said, later before we close the proceedings. (Is this legal torture?)

With pledges of Mr. Rubin's masters' future support, one does not have to be an alienist to predict [V:91] what Mr. Waller's conclusive ruling was.

"Biased decision-makers are constitutionally impermissible, and even the probability of unfairness is to be avoided." Applebaum v. Bd. of Directors of Barton Memorial Hospital (1980) 104 Cal.App. 3d 648, 163 CR 831 at 836.

For true peons, "the ALRA incorporates procedural safeguards of the NLRA including the separation of prosecutorial from adjudicatory functions". Tex-Cal Land v. Agr. Labor Relations Bd. (1979) 24 Cal.3d 335, 156 CR 1.

C. BIASED RULINGS AND FALSE FINDINGS

Earlier, before Mr. Waller realized how easily controvertible their testimony are, the hearing reporter (who commutes with Mr. Waller) recorded [I:8/11-15] this exchange:

Dr. Ortega: May I ask when you ask

for (witnesses) and I've no way of finding out how to defend myself against their testimony, can I recall them afterwards?

Hearing Officer: Certainly, you may recall any witness you want.

By noon of the first day of the hearing, Mr. Waller knew he had erred in [M] saying "Oh, we have what we need here. This won't take long" even before the hearing got underway. Having promised access to all witnesses that morning, he needed to bring them in fast. Did he, during [I:71] a long recess, as Chief Hearing Officer, free up 11/4-5/81 in order to leave less time to prepare for [vi] the surprise witness whose complaint was not received until the eve of the hearing? And then decided the interval [II:3] with "miscontinuance" was to the State's disadvantage and therefore decided [II:52, 143] to deny all subpoenas?

That afternoon, when he learned that the Superior Court was going to hear Dr.

Ortega's petition for discovery on Monday, Nov. 2, he pounded [IV:60] on the table, like Mr. Khrushchev, but without the shoe, and [I:88] shouted "This hearing is discovery!". Dr. Ortega entered that as Mr. Waller's opinion on the record but it was reported [I:80] as "practice of discovery". He had no intention whatsoever of honoring the intent of his Agency's discovery procedures. (Or of the court's discovery order later: With the prompting of Mr. Rubin who was privy to what Dr. Laskay's investigative notes contained, Mr. Waller talked Dr. Laskay into [II:150] defying the court order to produce all such notes and furnish them to Dr Ortega.)

Where Mr. Waller had not bothered to take notes before, he started scribbling his "findings" furiously soon after that outburst. Later, did he change [vi] "social work student" to [ix] "social

worker", mindful that only when employment is at risk is [OOO] sexual discrimination subject to punitive action? Neither complainant was known to Dr. Ortega before coming to Napa, and neither came to be tenured workers but as students. [VII:453-62]

Mr. Waller's proposed decision [ix] of March 8, 1982 does not say which of the alleged "causes" for dismissal were supported after [III:21] Napa had "completed our case", when hearing officer insisted Dr. Ortega be cross-examined while his witnesses waited to testify:

Nov. 17, 1981 transcript, p. 22:

> Hearing Officer Waller: "We're going to have you called as a witness, and we're going to identify what are the real issues in this case. We have broad boundaries in the discretion (of the hearing officer) in an administrative hearing.
>
> Dr. Ortega: I don't think you have that discretion.
>
> Hearing Officer Waller: I don't care to argue. You'll be called as a witness. Dr. Laskay, you'll be

excused.

Dec. 30, 1981 transcript, p.91:

Dr. Ortega: Mr. Hearing Officer, when Dr. Gandhi was called, I objected because she was my witness. And so I want to call her now.

Hearing Officer: Well, I think this is as good a time as any to settle that issue. You were advised at the time that it was well established procedure of the State Personnel Board to call a witness only once. No matter which party called the witness. And at that time the witness would testify to all relevant facts. Therefore I am not going to continue this hearing by calling all of these witnesses or any of them for the second time. So your motion to recall these people is denied.

Dr. Ortega: We have a precedent in this hearing about recalling people, so that's not true in the first day of the hearing. It's different now that I am presenting my defense.

Hearing Officer: No, you were put on notice fully and completely, Dr. Ortega, that these people would not be recalled. You choose to ignore that warning as you have many others. And therefore those people will not be recalled now. If you have other witnesses that have not testified in this matter, you may call them.

Dr. Ortega: Mr. Hearing Officer, one of the(ir) witnesses was recalled on that first day.

Hearing Officer: I don't care to argue it, Dr. Ortega. Do you have further witnesses you want to call or do you want the matter submitted.

Dr. Ortega: No, I don't want the matter submitted.

The specific findings of the Hearing Officer for his proposed decision (pages A-10 to A-14 of petition) which was accepted "in toto" by the CSPB are under challenge in State Court on the following grounds:

i) vs. III-V (Petition's A-12): The decision must be deducible from the circumstances to which the law refers which can be known to all the parties. [VII:453-62]

Both complaints of sexual harassment were made after Dr. Ortega had already been dismissed by phone, which means neither complainant felt harassed but were responding to earnest solicitation for any charges that can be written up to force Dr. Ortega's resignation. Furthermore, neither were Dr. Ortega's co-

workers nor supervisees. Finally, their complaints predated the Departmental Sexual Harassment Policy Guidelines -- (allegedly distributed with paychecks on March 30, 1981, to excuse omission from discovery documents, but not all its post-facto implications) -- which also excluded dismissal from its own list of sanctions (to thwart miscegenophobes?):

> "3. Departmental Responsibility and Employee Rights and Responsibilities: (The right to a discrimination-free work environment, the right to file confidential complaints, the right to be represented, etc.) Employees should be advised of their individual responsibility to inform the harasser that his/her behavior is unwelcome, offensive, or highly inappropriate. Individuals should also be encouraged to file timely complaints.
>
> "5. Potential Consequences for the "Harasser": This section to highlight the types of disciplinary actions, such as letters of reprimand, suspension, demotion, as well as possible civil liabilities for both the harasser and the department.

ii) vs. VI: Government must never coerce any person except in the enforcement of a known rule. [V:11-15, 67-73]

The only provision in the often revised State Administrative Manual about integrated data processing refers to purchase by the state of a computer system costing in excess of $75,000.00. In the present instance, no state money was disbursed, and the sub-purchase orders totalling $1,388.00, including taxes, and approved by Dr. O'Connor were way under the limit above which feasibility studies were required. (Even so, Dr. Ortega had submitted [D] a feasibility study prepared by the Research Department of UCSF [III:137-138] long before the computer training consultant contract was drawn up.

CALIFORNIA STATE PERSONNEL
ADMINISTRATIVE MANUAL
ELECTRONIC DATA PROCESSING
STATUTORY PROVISIONS

PROCEDURES (Revised 2/6/81), 4819.3:

"1. Section 4 of the Budget Act requires that procedures set forth

in the State Administrative Manual be met and followed prior to the expenditure of funds by any State entity for any electronic data processing activity. The purpose of this section is to implement these provisions. . . . In addition, the provisions of this section shall not apply to the University of California, the State Compensation Insurance Fund, the community college districts, agencies provided for by Article VI of the Constitution, or the Legislature." (It is evident that training computers are exempt from "State Rules and Regulations". [II:49-50])

"4. It is the intention of the Department of Finance to exempt from its review and approval all EDP FSRs (Feasibility Study Reports) except for those projects that have statewide, interdepartmental or intergovernmental impact, non-standard or extensive communications, or unusually large software or equipment acquisition costs, PROVIDED that the chief executive officer of the State entity (hereinafter called the department director) has approved the FSR. FSRs for all proposed EDP expenditures of $75,000 or less are automatically exempt from the Department of Finance's review, but each FSR must be approved by the department director prior to the expenditure of funds." (Dr. O'Connor approved [13a,b] the sub-purchase orders.)

The other findings -- (II: arrogance, abrasive personality, did not get along

well with Dr. O'Connor; VII: Dr. Vaughn "was shocked when he found he would not be paid", "contend that it was because he refused to contribute to the computer"; VIII: "agreeing to pay amounts in excess of authorized rates for such services", "contract was later disapproved"; IX: mislead Dr. O'Connor, and X: "assertions that he was denied prehearing discovery . . . were without merit", etc.) -- are themselves without merit and cannot be documented from the evidence presented or the oral testimony during the hearing.

(They were categorically denied, and not contested by cross-examination, in Dr. Ortega's written testimony [VII:370-507], which was demanded [V:111] over his protests and then disregarded. If he did not get along with Dr. O'Connor, it is highly unlikely that Mrs. O'Connor will have Dr. Ortega for a tennis

partner. And it is as unlikely that Dr. O'Connor can be misled by someone whose motives he suspects. Co-terminally, all "contributors" and both Dr. O'Connor and Dr. Laskay testified [II:103/21 and III:9/12, respectively] that there was no coercion to "contribute" and there was no charge of coercion at any time.)

D. ARGUMENT

In law, a decision cannot depend on any special knowledge or "the capricious 'ipse dixit' of authority" that is not even made explicit as a matter of public record in the body of the decision itself, or by a tribunal's momentary purposes, no matter how impartial it was -- (the hearing officer was not [M]) -- and the particular values it attaches to different concrete aims, including the preferences it may have concerning the effects on different people.

[E] An ex-executive, then resident, wrote:

A. Overtime Compensation. This allegation is completely out of focus and perspective. It fails to recognize . . . the active participation of the residents, in conference with Dr. Ortega, to seek ways and means of raising money to purchase a mini-computer. The(ir) interest . . . arose, in large part, from my work with similar computers under the direction and supervision of Dr. Enoch Callaway, Director of Research . . . University of California, SFO. This work was one day per week in January, February, and March of 1981, and was part of my residency in Psychiatry . . . This led to our conferences previously mentioned. Together we decided on the overtime work for pay approach mentioned in the allegation . . . It is not at all clear that Dr. Ortega violated any...policies or regulations since nothing was really done.

C. Sub-paragraph 4 of this allegation states clearly, succinctly, and sufficiently all that needs to be said about this allegation: "4. The contract has not been approved and Mr. Saeedi has not been paid." I would ask then this simple question: Where and what is the evidence or substantiation for any punitive action when no one has a basis for complaint? Is the State Mr. Saeedi's advocate for this action?

E. Deception. This entire allegation is patently absurd for a responsible executive director or administrator to present. It reflects as much upon the ineptness and inability of the executive to administer and to manage as it does upon the subordinate to present documents for consideration and signature.

Sub-paragraph E 1) states: This was done under the guise of an emergency and after you refused the Executive Director's order to go through the chain of command." Are we to believe that the Executive Director is unable to give cogent orders? Further, in this instance, what is the chain of command? (I believe it to be Director of Professional Education to Executive Director.) Again, as in previous allegations, the sub-purchase orders were never executed, no money was spent and nothing was purchased. (Now if you were fishing, your catch would have escaped because you attempted too early to pull the hook.)

Next, we read in this allegation direct statements regarding Dr. Ortega's intentions with Dr. O'Connor to "deliberately mislead", "actively deceive" and to not follow NSH policy and procedure. Now, I ask you, if Dr. O'Connor is fully aware of these policies and procedures, why did he not cause this interchange to come to a halt and why did he not counsel Dr. Ortega on his apparent, patent and even blatant disregard for these policies? It is apparent to me that Dr. O'Connor was a willing participant in this matter, neither misled nor deceived until some subordinate later brought this to his attention.

Paragraph F 1) alleges that Dr. Ortega removed the computer and printer from NSH on Augist 15-16, 1981, without authorization and took them to his home. Ownership of this equipment has not been established; therefore it seems ludicrous to allege that authorization is needed for one person to remove personal property from one place to another. It does not belong to NSH or to the State

of California; it does not belong to any indivdual who has filed a law enforcement or legal complaint and there appears to be no valid reason for accusing Dr. Ortega of anything.

G. Leave of Absence . . . One thing is clear through personnel policy and Dr. Ortega's previous actions: Dr. O did have the basic authority to place the medical resident on a leave of absence . . . I do not understand nor are here given any explanation of why it became necessary for someone to (a)void a legitimate, duly authorized Leave of Absence "in order to honor the State's obligation to an employee". This smacks again of administrative incompetence and a real failure of the executive director to support a department head. Furthermore, it is not at all clear what "inappropriate personnel practices" were carried out by Dr. O...

I. Sexual Harassment of Female Resident. This allegation is nearly unbelievable in California . . . To allege misconduct of an American citizen ten or more years after the alleged misconduct is so ludicrous, so far out of the bounds of common law as to be unworthy of addressing by this hearing . . . Do we ask why no other similar incidents are mentioned?...Or do we question why this lady has continued a close professional relationship on the staff of the Department of Professional Education in the light of her serious allegation?

STANDARDS:...He is uniquely incisive, stimulating, challenging, and especially is he personally professional. For each resident trainee Dr. O applies himself to assure the best possible training program. In no other residency program

with which I am familiar is the Professor so intimately involved, so fully committed to the training of his residents...

This hearing has, in our view, no other recourse than to reverse the improper dismissal of Dr. O. and to reinstate him. . .

E. PSEUDO-JUDICIAL REVERSIBLE ERRORS:

I. The documents on which the charges were based, which the Skelly decision demands must be in the employee's hands before an informal meeting with the employer "initially imposing the the discipline", were not made available even after the hearing had started. [I:4, II:1,67]

II. Continuance was refused and hearing started after an amended notice of punitive action was sent on the eve of the hearing. [I:37, 43, 80, 88]

III. A court order [H] to produce missing documents was defied [II:150] at the instigation of the hearing officer who, in anger at the court presuming to hear Dr. Ortega's petition for discovery, started

[IV:60] pounding the table and screaming, "This hearing is discovery." [I:80, 88]

IV. Discovery of documents (consultant contracts, investigative notes, etc.) was incomplete and had to be demanded during cross-examination of witnesses testifying about false evidence introduced as exhibits. [II:93, 127, 150; III:39]

V. All requests for subpoenas were refused, and some witnesses who want to testify, whose testimony are known to contravene Napa's case, were denied to Dr. Ortega. [II:52, 143]

VI. After Napa had [III:21] presented all its witnesses, and its last (Dr. Laskay) still under cross-examination, and while Dr. Ortega's witnesses from great distances are waiting to testify, the hearing officer, Mr. Waller, himself [V:96] demanded, contrary to specific provisions of the Evidence Code, that Dr.

Ortega take the stand as an adverse witness, and submit to cross-examination, whose content he kept suggesting to Napa's counsel, Mr. Rubin, "so we can actually find out what the issues are in this case". [III:21-22]

VII. When Dr. Ortega started to testify after testimonials from witnesses who were screened as to whether they were privy to the controversy (i.e., had they testified as part of Napa's case), he was [V:110] interrupted and [V:111] told to submit his testimony in writing and then be cross-examined again, but [VI:2] was not, in order [V:111] not to re-open "a can of worms". [ix, x]

VIII. The hearing for [viii] cross-examination was advanced before [VI:3] Dr. Ortega could finish his written testimony but [VI:4] oral testimony again was refused and [VI:5] the hearing adjourned for good since there were no cross-examination questions.

IX. The exhibits [A-000] sent along with the written testimony were disregarded in [ix] the proposed decision.

X. The "findings" on which the decision to dismiss was based consisted solely of [I:12-121] oral testimony by state witnesses (1) before the court ordered that all notes and documents be produced and furnished to Dr. Ortega, and either (2) not cross-examined pending discovery or (3) subsequently [IV:3-10] denied to Dr. Ortega even as adverse witnesses.

XI. The proposed decision and the "findings" on which it is based was not sent to Dr. Ortega, before it was accepted as the Agency decision, contrary to explicit provisions and implicit intent of law with respect to such proposed decisions. GC §19582(b).

XII. Some of [ix] the findings were not about allegations included in [vii] the original or [vi] amended Notice of Punitive Action, but the hearing

officer's recommendation to punish Dr. Ortega by dismissing him was [x] accepted by the Agency.

XIII. The hearing officer had highly idiosyncratic ideas of the intent of the state with regards [V:72] computers and [ix] sexual discrimination, [II:52, 143] subpoenas and [II:150] discovery, [I:10/20, 88/24] discomfort of the witness (mollycoddling) vs. [IV:3-9] rights of the accused (fact-finding), [I:88, II:21, V:96] quasi-judicial discretion and [V:110-11] abuse of the judicial process, [xv, xvi-a to -f] mitigation (none) and [V:15] punishment (extreme). [E, P, III:23 - 142, IV:54 - 87, V:4 - 109]

(CAVEAT: Mr. Waller cannot be all that bad or he would not be Chief, Hearing Office, SPB. Is it Dr. Ortega? [I:68])

SELECTED/CITED EXCERPTS FROM THE RECORD

[III:122] Hospital director from 1964·

Q: In all the time you have known me, have I deceived you?
A: Not that I am aware of.

Q: Did my --
A: You irritated me at times, but never deceived me.

Q: Did my department change during that time?
A: Yes, it grew considerably.

Q: While the hospital was shrinking?
A: While the hospital was shrinking, and I will say that I always admired you for that, that you were able to maintain this residency program under the opposition of the Department of Mental Health in Sacramento.

In fact, as far as I know, you were the only one that maintained an accredited residency program in a State Hospital in California.

[III:131] A former resident who could not live on the training stipend:

Q: Dr. Jackson, without any prompting on my part, you came to me and said you knew what I was doing about the contributing. What did you tell me?
A: I don't know if I was so bold to say I knew what you were doing, but I knew that I -- that the one thing I thought the overall effect was that the investment of time and money and that the level of attention and involvement in the computer would be heightened, and that if a computer suddenly appeared, it would probably be treated with some disinterest unless there was an active involvement and interest on the part of the residents.

This was, I think, an effective way of heightening and making some kind of an investment in it in either time or money.

[9b] As a hospital doctor, he wrote:

> "Although I'm no longer directly involved with the program, I spend close to 10 hrs/week at the department and suddenly, the loud griping and voluminous bursts of outrage at Ortega and all his craziness are being replaced by whispers and quick glances over-the-shoulder. There is fear now where there used to be confusion. The atmosphere is markedly different; the warmth is gone, replaced by a chilly wind. The fire is out.
>
> "Opportunities are being lost, futures more contained. There is more equality and less fairness. Formerly, a resident was put on leave for avoiding an assignment; now a resident's positon (i.e., job) was threatened for seeking an assignment.
>
> "I am glad to have been in Rome when mythology was still live and life itself was mildly raucous before the ecclesiastics took control and watched it die."

[V:77] An alumnus who came to the hearing:

Q: Your experience with me over the years that we have known ech other, can you say something about that?
A: I think you're autocratic. It's the first word that came to mind. Your're also an excellent teacher, one of the most creative that I've met.

Q: In that -- I'm sorry, Mr. Hearing Officer. In your -- can you elaborate further on the autocracy?
A: In all the time that I've known you,

you have made decisions about who should go where and do what and when. Seemingly regardless of what they wanted. Many residents have resented that. I've talked with many of them. I myself have resented that at times and in all that I never felt, and even in retrospect never felt that any of those decisions were made for other than concerns about their education and turning out quality psychiatrists.

[IV:19] Mr. Friday's better respected "second banana":

Q: How is the contract approved?
A: It's approved both locally and at headquarters.

Q: What happens if it is not approved locally?
A: Then it remains unapproved and to my knowledge you would have severe problem.

Q: What happens if that disapproval was protested?
A: Well, I believe then there would be a meeting of the minds between the protester, the reviewing party probably at headquarters and the person that needs the consultant.

Q: So you'd have a three way meeting at least?

. . .

A: I would -- am speaking from my other case. I would assume there would be this, yes.

[IV:54] First year medical resident:

Q: Do you remember meeting with Dr. O'-Connor at the start of the investiga-

tion?
A: Yes.

Q: Do you remember his mentioning that the person who started it stipulated that if the administrator didnot look in his complaints, State investigators would be called in?
A: Yes.

Q: Do you remember Dr. O'Connor talking at great length about his experience under my directorship?
A: Yes, he had mentioned that he had come here because of your -- the novel way you had let him interview the patients during his application time.

Q: And he had been accepted in many other places?
A: Yes.

Q: Do you remember his talking about some unhappiness he had also?
A: I think he mentioned about your telling him to go to Mt. Zion for (rotation) and he was not happy about it because of the commute or something but after going to (rotation) he was glad he had gone through it and it had helped him pass the boards. (Reporter heard "meditation" for "rotation" both times!)

. . .

Q: Do you remember seeing Dr. Vaughn the first day of your orientation in July?
A: Yes.
Q: Do you recall my telling him he should be in Highland?
A: Yes.

Q: At the meeting with Dr. O'Connor did that resident worry about reprisal?
A: Yes.

Q: Did he worry because Dr. O'Connor was

oh, so positive that all would turn out well?
A: Yes.

Q: Did Dr. O'Connor answer him that Dr. Ortega was not that type of a person?
A: Yes.

Q: Were you told by the same resident(s) after the meeting to expect questions about sexual harassment?
A: We had gone from the meeting with Dr. O'Connor. We went to our usual conference room and were discussing about the investigation. I men the -- your leave, and he ha said expect questions about -- "I've something else for you" he said. He told us and said expect questions on sexual harassment.

. . .

Q: While all this was happening none of you could see me; is that right?
A: Yes, we had received a memo that we could not see Dr. Ortega during office hours.

Q: And yet you are not on a 40-hour week, are you?
A: No.

Q: Did Dr. O'Connor reassure the residents that UC Davis would not take over the training program?
A: Yes.

Q: Has there been a significant increase in sick leave since my dismissal?
A: I don't know.

Q: I have to ask these questions. Did the Hearing Officer accuse me of harassing him and pounding the table on the first day of the hearing?
A: Yes.

Q: Did he promise witnesses will be returned for Cross Examination?
A: Yes.

[V:41] Dr. Linn, Dr. O'Connor's ex-boss:

Q: If the computer was alleged to have been purchased because of coercion on the basis of coercion of contributors who happened to be the residents, would you investigate the Chief of Professional Education?
Q: An allegation of that sort would be a very serious one and would certainly merit looking into, yes.

Q: How would you proceed?
A: If there are still special investigators present at -- in State service as they were when I was the director, I would assign that investigation to that individual.

Q: Why him?
A: Because his training is in criminal type investigations and this is an allegation which is very close to a criminal allegation here.

. . .

Q: If you did not have a special investigator available, what would you do if an investigation is necessary.?
A: Well, I would obviously try to choose the most unbiased group of individuals that I could find. One who had, perhaps from another hospital that had no connection with any of the parties involved.

[V:57] Second year psychiatric resident:

Q: Did Dr. Brannick announce that Dr. O'Connor officially terminated Dr. Ortega

on the first of September?
A: It think it was on Tuesday when we were having our regular conferences that Dr. Brannick told us as acting Chief of Professional Education that Dr. O'Connor has terminated Dr. Ortega.

Q: Did Dr. O'Connor mention that he had offered Dr. Ortega the option of resigning?
A: Yes.

Q: And now that he was dismissed, he was not eligible for time and benefits?
Q: If I remember right, one of the residents asked if you still have those benefits and Dr. O'Connor said since you refused to resign then you, and you were terminated, then you don't, you are not entitled to the benefits.

Q: Did he say that he consulted with other officials before deciding to dismiss me?
A: Yes.

[V·82] A senior psychiatric resident:

Q: ...Simply: Why would you give $80 that you did not have at the time and that you did not have until July, for a computer?
A: Well, it's for educational and research purposes, and I was -- and I am next on the line to do research, so I am interested in it.

Q: You expect to use it in your research?
A: Yes, I used it recently. I have a -- most of the data because I'm doing research on immunology and making some correlations with psychosis.

Q: You expect to finish that research?

A: With the help of Dr. Callaway of UC (San Francisco), yes, I hope so.

Q: You expect to use the computer for that?
A: I expect to use it more often.

Q: When was the last time you used it?
A: Just recently. In your house. I don't -- maybe a month ago.

Q: Do you want your $80 back?
A: No, I voluntarily contributed it for the computer.

Q: Incidentally, is it costing you more to attend these hearings?
A: Yes, it would.

Q: How much have you spent of your own money to attend these hearings?
A: Oh, I've taken vacation time.

Q: How many days?
A: Since the start of the hearing.

Q: In cash, how much would that be?
A: I'm not sure. Would it be -- if it is $10 or $11 per hour, so I took vacation. I don't know how many days already.

Q: And you did not have that money in July to give?
A: No.

Q: Why do you -- why do you come?
A: Well--

Q: This is not a movie.
A: I -- I feel I have a lot of strong feelings about this. I don't understand why you were dismissed and why so precipituously. I still don't understand.

Q: You've been to all these hearings?
A: Yes.

Q: And you cannot understand from what has happened so far?
A: I don't know.

F. CONCLUSIONS

The Notice of Punitive Action of Sept. 14, 1981 lists as "causes" under Govt. Code Sec. 19572, only some subsections:

> (b) incompetency or lacking ability, (c) inefficiency or [III:74] excessive delays, (e) insubordination or disrespectful conduct, (f) dishonesty or lying or stealing, (o) willful disobedience or [VII:523] violation of prohibition, (p) misuse of state property, and (t) other failure of good behavior [III:140] which causes discredit to his employment that can be indisputably established.

Ex-hospital director still at Napa:

> Dr. Ortega: Did I ever bring discredit to the hospital? [III:126]
>
> Dr. Spratt: Not that I am aware of.

Hearing Officer Waller has to interpret Govt. Code Sec. 19572 like the Kremlin does its Article 58 of their Criminal Code to find cause to dismiss someone against whom no one has lodged a

grievance in 17 years.

[Surely absence of confrontation with accusers can dismiss all dismissals.]

Russians do not have the right to subpoena/confront state witnesses.

Their criminals also do not have the right to a professional defender. In our courts they do, but only if they are poor. Those impoverished by state action cannot obtain legal redress, unless their livelihood is equated with their limbs, and the court balances the power of the state by assigning legal counsel. "Equality" with tax-subsidized attorneys before civil law can only be offered to the rich, until we have enough lawyers for all the needy. Unless the Supreme Court turns down all appeals except to grant officials absolute immunity, after qualified immunity has already been recognized by lower courts. Butz v. Economou, (viii) above.

G. OTHER RECOMMENDATIONS

To be fair, Mr. Waller may have absolute immunity as hearing officer for impoverishing Dr. Ortega, but as CSPB's Chief Hearing Officer he has grossly misrepresented the intent of the statutory provisions about electronic data processing by the California State Personnel Department Manual and the guidelines about sexual discrimination, and subtly [II:150] suborned (sic) Dr. Laskay to defy the court order to produce all investigative notes by leading him to offer to testify entirely from memory on Nov. 16, 1981.

1) Should his employer's contributions to Mr. Waller's retirement be withdrawn since he deliberately deceived the public and the agency about his role and his "findings" in "doing his job"? A playing umpire is no umpire, especially when he supports his quasi-judicial rulings and de-

cisions with insupportable opinions about discovery rules and court orders, statutory intent and content; or agency policies and practices.

Dr. Laskay is now dead and his death and Mrs. Owen's "retirement" had been used by Mr. Rubin as grounds for his motion to dismiss Dr. Ortega's petition for writ of mandate for reinstatement. Mention of Mrs. Owen was of course a legal red herring. We will be caught in another legal treadmill. Mr. Rubin knows that Mr. Waller interrupted Dr. Ortega's cross-examination of Dr. Laskay by violating the specific provisions of Evidence Code Sec. 776, which required counsel, not hearing officer, to call an adverse witness to the stand. [III:21, V:96]

2) Dr. Ortega having been deprived of his "day in court", -- (no ruling about rehearing will allow him to regain that right with Dr. Laskay

out of reach for cross-examination), -- can this Court rule that the CSPB hearing was null and void?

Mr. Rubin's first motion to dismiss Dr. Ortega's petition was denied, but he has reserved the right to raise it again, not having produced proof that Dr. Laskay is dead. He is, technically, but the Attorney General sent Dr. Laskay's notes to the Federal District Judge after he had ruled against Dr. Ortega (to quiet his doubts, no doubt). [First Amended Petition, p. 31] Was this a good "good faith" tactic?

3) Can Dr. Ortega's jury to assess damages be instructed by another District Judge by order of this Court of last resort?

Reckless disregard for the law is demonstrable, legal abuse extreme, but the remedy is expensive to the victim in borrowed time and unborrowed money. Even an award of actual damages will not

return him to "status quo ante". More importantly, human nature being what it is, there will be other more helpless victims who need not be victimized, if the officially corrupt and righteous can be fairly and judiciously "check-mated" by the incorruptible and unvengeful.

ADDENDUM: If respondent may be permitted one historical, and last, comment: The State started out as a playful, not an adversarial, enterprise. It was for fun, with fun, and in fun, not to institutionalize a pecking order. (Absolute immunity may be necessary to keep order in the prison system, but qualified immunity is not necessary for hatchet men in employment. Especially in California, where the hearing officer's decisions are automatically defended by the Attorney General while the ex-employee must fend for himself.)

Supreme Court, U.S.
FILED
MAY 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

(5)

No. 85-530

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DENNIS M. O'CONNOR, et al.,
Petitioners,

vs.

MAGNO J. ORTEGA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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74pp

TABLE OF CONTENTS*

DOCKET ENTRIES IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA ii

DOCKET ENTRIES IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT ... vi

COMPLAINT FILED JULY 30, 1982 WITH EXHIBITS A, B, and C 1

NOTICE OF HEARING FILED MARCH 15, 1984 (PLAINTIFF) 12

DECLARATION OF MAGNO J. ORTEGA FILED MARCH 15, 1984 13

NOTICE OF MOTION FOR SUMMARY JUDGMENT, FILED MARCH 14, 1984 (DEFENDANTS) 16

DECLARATION OF RICHARD FRIDAY FILED MARCH 28, 1984 18

DECLARATION OF SHIRLEY CIRAULO FILED MARCH 28, 1984 20

REPORTER'S TRANSCRIPT OF HEARING ON MARCH 29, 1984 BEFORE THE HONORABLE JOHN P. VUKASIN 22

DEPOSITION OF DR. DENNIS M. O'CONNOR, PAGES 8-12, 18-21, 26-27, 32-34, 40-42, 44, 46-47, 49-52, 60-61, 71 26

DEPOSITION OF RICHARD FRIDAY, PAGES 17-31, 36, 38-39, 45 47

DEPOSITION OF JIM STRATTON, PAGES 7, 9, 41, 42 and 46 61

---

* The opinion of the United States Court of Appeals for the Ninth Circuit, the judgment of the Federal District Court, and the decision of the California State Personnel Board are printed in the appendix to the petition for certiorari.

DOCKET ENTRIES IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

ORTEGA v. O'CONNOR, et al.
C-82-4045JPV

July 30, 1982.....	Complaint, Summons issued. Jury demand.
October 20, 1982	Defendant Asher Rubin notice of motion, hearing set for 11/19/82 at 9:30.
October 20, 1982	Defendants Dennis O'Connor, Richard Friday, Dorothy Owen & Stefan Donoviel ANSWER to complaint and demand for jury trial.
October 28, 1982	Proof of service as to Gilbert Graham and Raul S. Picardo.
November 9, 1982.....	Plaintiff's reply to motion to dismiss by defendant Rubin, hearing set for 11/19/82 at 9:30.
November 22, 1982.....	STIPULATION & ORDER: defendant's motion to dismiss will be taken off calendar and that plaintiff will be granted 30 days from said hearing date to file an amended complaint.
January 19, 1983	Plaintiff's first set of interrogs.
January 27, 1983	Plaintiff's first amended complaint.
February 14, 1983.....	Plaintiff's first request for production of documents.
March 22, 1983.....	Defendant Asher Rubin notice of motion, hearing set for 4/29/83 at 9:30.
March 22, 1983.....	Defendant Dennis O'Connor et al. answer and demand for jury trial.
April 4, 1983.....	Plaintiff's deposition notice of Dennis M. O'Connor on 4/21/83 at 9:00.

April 15, 1983	Plaintiff Magno J. Ortega memo of points and authorities in opposition to motion to dismiss and/or strike. Hearing set for 4/29/83 at 9:30.
April 29, 1983	MINUTES: (c/r R. Linkerman), defendant motion for dismissal GRANTED part, DENIED in part. Case continued to 11/18/83 at 10:00 for pre-trial conference, case continued to 12/5/83 at 10:00 for trial.
May 2, 1983	ORDER: defendant Rubin's motion to dismiss be GRANTED without leave to amend as to the allegations of violations of 42 USC:1981 and 42 USC:1985. It is further ordered that defendant Rubin's motion to dismiss is DENIED.
May 17, 1983	Defendant Asher Rubin answer and demand for jury trial.
June 14, 1983	Plaintiff deposition notice of Richard Friday on 6/28/83 at 1:00. Jim Stratton on 6/28/83 at 3:00, Louis Langoria on 6/28/83 at 4:00.
July 5, 1983	DEPOSITION of: Dennis M. O'Connor, 4/27/83.
August 26, 1983	DEPOSITION OF: Richard Friday, 6/28/83.
November 8, 1983	Clerk's Order Setting Status Conference for 11/22/83 at 10:00 a.m.
November 23, 1983	MINUTES: (C/R none 11-22-83) Status Conference Held, case continued to 4/5/84 at 10:00 a.m. for Pretrial; Jury Trial, 4/23/84 at 10:00 a.m.; Discovery Cut-off 3/15/84 JPV
November 30, 1983	ORDER RE: STATUS CONFERENCE: Plaintiff to file any motions for summary judgment by 2/15/84; discovery cut-off, 3/15/84; Pre-trial conference, 4/5/84; Trial, 4/23/84 JPV

March 14, 1984.....	Defendants O'Connor, Owen et al's Notice of Motion for Summary Judgment, 4/10/84 at 10:00 a.m. —Proof of Service —Motion for Summary Judgment —Declaration of Asher Rubin —Declaration of Jeanette Raap
March 15, 1984.....	Plaintiff's Notice of Hearing re: Motion for Partial Summary Judgment and/or Specification of Facts 4/10/84 at 10:00 a.m.
March 15, 1984.....	Plaintiff's Motion for Summary Judgment or Order Specifying Facts 4/10/84 at 10:00 a.m.
March 15, 1984.....	Plaintiff's Memo of Points and Authorities in Support of Motion for Partial Summary Judgment.
March 15, 1984.....	Plaintiff's Statement of Facts in Support of Motion for Summary Judgment.
March 15, 1984.....	Plaintiff's Declaration of Magno J. Ortega.
March 15, 1984.....	Plaintiff's Declaration of Asha M. Gandhi, M.D.
March 15, 1984.....	Plaintiff's Declaration of Gilbert T. Graham.
March 14, 1984.....	Plaintiff's Deposition Notice of Dorothy Owens, Stefan Donoviel, Asher Rubin, 3/26/84.
March 19, 1984.....	Copy of letter dated 3/14/84 from Nancy Wainwright to Gilbert T. Graham re: Depositions and Possible Continuance of Trial Date.
March 26, 1984.....	Plaintiff's Opposition to Defendant's Motion for Summary Judgment 4/10/84 at 10:00 a.m.
March 26, 1984.....	Plaintiff's Supplemental Declaration of Magno J. Ortega.
March 26, 1984.....	Defendants' Opposition to Plaintiff's Statement of Facts.
March 26, 1984.....	Defendants' Opposition to Plaintiff's Motion for Summary Judgment.

March 27, 1984.....	Reporter's Transcript, 4/29/83.
March 28, 1984.....	Defendants' Errata re: Opposition to Plaintiff's Summary Judgment.
March 28, 1984.....	Defendants' Submission of Original Declarations in Opposition to Plaintiff's Motion for Summary Judgment —Declaration of Richard Friday —Declaration of Dorothy Hesskett —Declaration of Shirley Ciraulo
April 2, 1984.....	MINUTES (C/R Larry White) 3/29/84—Plaintiff's Motion for Summary Judgment DENIED; Defendant's Motion to Dismiss, Stay, DENIED; Defendant's Motion for Summary Judgment GRANTED, Motion to Dismiss Defendant Ruben, GRANTED JPV
May 23, 1984.....	ORDER: Defendants Rubin, O'Connor, Friday, & Owen's Motion for Summary Judgment is GRANTED, Plaintiff's Motion for Summary Judgment is DENIED JPV —Entered in Civil Docket 5/31/84 Clerk
May 30, 1984.....	JUDGMENT: Summary Judgment is Granted in Favor of Defendants & Action is Dismissed —Entered in Civil Docket 5/31/84 Copies to Counsel
June 4, 1984.....	Defendants' Notice of Entry of Judgment.
June 27, 1984.....	Plaintiff's *Notice of Appeal* Fee Paid, Notice to USCA and Counsel #84 2169
July 11, 1984.....	Appellant's Designation of Reporter's Transcript, 3/29/84.
July 25, 1984.....	Reporter's Transcript—3/29/84.
July 26, 1984.....	Mailed Certificate of Record to USCA and counsel.

DOCKET ENTRIES
U.S. COURT OF APPEALS
FOR THE NINTH CIRCUIT

ORTEGA V. O'CONNOR, et. al.
CASE NO. 84-2169

June 29, 1984.....	DOCKET NUMBER ASSIGNED
July 2, 1984.....	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSELS.
July 10, 1984.....	Filed appellant's civil appeal docketing statement (7/9) (CONFATT)
July 30, 1984.....	Filed as of July 27, 1984, CERTIFICATE OF RECORD (7/25/84).
September 14, 1984.....	Filed Order (Mot. Atty, RGK) (1) Aplt shall file a brief of not more than 25 pgs on or before Oct. 31, 1984. (2) Aples shall file a brief of not more than 25 pgs on or before Dec. 7, 1984. (3) Apl may file a reply brief of not more than 10 pgs within 14 days of the service date of aples' brief. This order is subject to reconsideration by a judge if an objection is filed within 10 days of the entry of the order. (9/14)
October 31, 1984	Filed Orig & 15 copies of aplt's opening brief (22 pgs.) & 5 copies of the Excerpt of Record. 10/30.
November 19, 1984.....	Filed aplt's application to supplement aplt's opening brief. (11/16) (CIVATT).
November 19, 1984.....	Receivd aplt's supplement to aplt's opening brief. (11/16) (CIVATT).
December 4, 1984	Filed order (Sneed) aplt's motion to supp'l his opening brief is granted. The supplemental received by the clerk on November 19, 1984 shall be filed.

December 4, 1984	Filed aplt supp'l Opening Brief rec'd 11/19/84.
December 7, 1984	Filed aple's application for ext. of time to file. (12/7) (CIVATT).
December 17, 1984	Filed Order (Mot/Atty, SMJ) appellees' motion for ext. of time to file the answering brief is granted. The brief shall be filed on or before 1/7/85.
January 9, 1985	Filed as of 1/8, Original & 15 Appellees' briefs (27 pgs); 15 attachments to appellees' briefs (Note: It appears that these attachments are appellees' supplemental excerpts; 1 day ext. and 2 page oversized orally granted, RGK). 1/8
January 24, 1985	Received as of 1/23, Orig. & 15 Aplt's Reply Briefs. (16 pgs) 1/24 (oversized; needs motion; notified counsel).
January 24, 1985	Received letter dated January 23, from aplt re: aplt were granted ext. of one day to file reply brief (per CIVATT).
January 29, 1985	Filed aplt's mot. for leave of court allowing aplt to file oversized reply brief. (1/29) (CIVATT).
February 7, 1985	Filed Order (Mot. Atty. SMJ) granting appellant's motion for leave to file an oversized reply brief of 16 pages. The brief, received by the clerk as of January 23, 1985 shall be filed.
February 7, 1985	Filed Orig. and 15 aplt's reply briefs previously received.
March 14, 1986.....	Ltr sent to aples, re: failure to designate records.
March 19, 1985.....	Rec'vd response of aple, re: designated record on 3/18.
March 26, 1985.....	Filed Cert. Transc. of Record on Appeal in three volumes: Vol.I-II, Orig. Pldgs, Vol. III, Orig R/T's. *Orig. Deposition Filed in One Envelope.*

April 11, 1985	Cause argued & submitted to: Schroeder, Nelson, Reinhardt, CJJ.
June 27, 1985	Ordered Opinion (Nelson) filed and Judgment to be filed and entered.
June 27, 1985	Filed Opinion—Affirmed in part; reversed and remanded in part.
June 27, 1985	Filed and entered Judgment.
July 9, 1985	Filed Order (Dep. Clk) Pursuant to direction from the court, each party shall bear its own costs.
July 9, 1985	Recvd aplt's bill of costs. 7/3 (see order of 7/9/85).
July 17, 1985	Filed aplt's application for attorney's fees. 7/16 CIVATT
July 17, 1985	Filed aples' motion for stay of mandate. 7/17 (Nelson).
July 24, 1985	Filed aples' opposition to petitioner's request for attorney's fees. 7/23 CIVATT
August 13, 1985	Filed aplt's Memorandum of Points and Authorities in opposition to aple's motion for stay of mandate. 8/8 (Nelson)
August 15, 1985	Filed Order (Schroeder, Nelson & Reinhardt) Appellees' motion for stay of mandate, filed July 17, 1985, is denied. (8/15).
August 23, 1985	Mandate issued.
October 7, 1985	Rec'd SC notice of filing petition for certiorari on 9/25/85. #85-0530.
December 10, 1985	Rec'd letter dated 12/05/85, from aplt's atty re: his disposition on atty fees. 12/05 (CIVATT).
December 13, 1985	Filed cert. copy of SC order of December 9, 1985, *granted certiorari.* #85-0580 (Panel).

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Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MAGNO J. ORTEGA,
Plaintiff,
vs.
DENNIS M. O'CONNOR, EXECUTIVE DIRECTOR, NAPA STATE HOSPITAL; RICHARD FRIDAY, BUSINESS MANAGER, NAPA STATE HOSPITAL; DOROTHY OWEN, PERSONNEL OFFICER, NAPA STATE HOSPITAL; STEFAN DONOVIEL, CLINICAL DIRECTOR, NAPA STATE HOSPITAL; ASHER RUBIN, DEPUTY ATTORNEY GENERAL, STATE OF CALIFORNIA,
Defendants.

No. 082-4045-RHS
COMPLAINT
(JURY TRIAL DEMANDED)

COUNT I

(VIOLATION OF CIVIL RIGHTS)

1. Plaintiff MAGNO J. ORTEGA is a citizen of the State of California and the United States of America. Plaintiff is and has been since 1964 a licensed physician in California, and is and has been since 1969 a Board-certified psychiatrist in California. From 1964 to September 22, 1981, plaintiff held the position of Chief of Professional Education at Napa State Hospital of the State of California.

2. Defendants DENNIS M. O'CONNOR, RICHARD FRIDAY, DOROTHY OWEN, STEFAN DONOVIEL and ASHER RUBIN, are all citizens of the State of California and residents of this judicial district.

3. The matter in controversy exceeds $10,000, exclusive of interest and costs.

4. This action arises under Title 42 of the U.S. Code, §§ 1343, 1983 and 1985, and this Court has jurisdiction of the action under Title 28 of the U.S. Code, §§ 1331, 1332 and 1343.

5. At all times pertinent to this Complaint, defendant DENNIS M. O'CONNOR was Executive Director of Napa State Hospital, State of California; defendant RICHARD FRIDAY was Business Manager of said hospital; defendant DOROTHY OWEN was Personnel Officer of said hospital; defendant STEFAN DONOVIEL was Clinical Director of said hospital; and defendant ASHER RUBIN was and is a Deputy Attorney General of the State of California. In doing the acts and things hereinafter set forth, said defendants were acting, in their respective capacities as stated, under color of state law of the State of California, and also under color of a custom or useage of management of Napa State Hospital, State of California.

6. On or about July 30, 1981, defendant O'CONNOR abruptly and without legal, reasonable or rational grounds for doing so, and in violation of Government Code § 10574.5, ordered plaintiff ORTEGA to be placed on "administrative leave" from his employment position described above. A copy of the letter from Dr. O'Connor to Dr. Ortega, dated July 30, 1981 "honoring" plaintiff's request to use his vacation leave instead of being placed on administrative leave, and ordering plaintiff to "remain off-grounds" during said two-week period, is attached hereto as Exhibit A and incorporated herein by reference. Said administrative leave was to have lasted for a period of two weeks, extended by defendant O'CONNOR on August 14, 1981 to an indefinite period of time, for the alleged purpose of investigating complaints against Dr. Ortega in the performance of his duties. A copy of the Memorandum from defendant O'CONNOR to plaintiff, dated August 14, 1981 to this effect is attached hereto as Exhibit B and incorporated herein by reference. Defendant O'CONNOR on said date ordered plaintiff to stay out of plaintiff's own private office, and

defendants O'CONNOR and FRIDAY caused said office to be locked and secured and the locks changed so that plaintiff could not have obtained entrance even if he had so desired.

7. On or about July 30, 1981, defendant O'CONNOR and defendant FRIDAY directly ordered and directed two men employed by Napa State Hospital, whose names are presently unknown to plaintiff, to break into and enter plaintiff's private office and seize plaintiff's entire files, possessions, articles and other belongings (hereinafter "articles") in said private office, remove said articles and take them to defendants O'CONNOR and FRIDAY, for the alleged purpose of investigating plaintiff, and withholding said articles from plaintiff for the purpose of intimidating him, interfering with his rights to access to said materials, and coercing, extorting and inhibiting plaintiff in his assertion of lawful defenses to the subsequent termination of plaintiff from his employment position by defendant O'CONNOR. On or about July 31, 1981, the said two men obeyed said orders and directions from defendants O'CONNOR and FRIDAY, and performed the acts alleged herein, conducting a patently unconstitutional Gestapo-type raid that "shocks the conscience" and discredits the State of California.

8. The articles, possessions and belongings seized by defendants and withheld from plaintiff as alleged above, include but are not limited to, the following:

(a) Purely personal correspondence from friends and family;

(b) Photographs of friends, acquaintances and family;

(c) Medical files and correspondence from private patients unconnected with Napa State Hospital;

(d) Appointment book, containing personal notes as well as official appointments;

(e) Personal financial records and accounts;

(f) A file (approximately 18 feet long) of IBM cards, containing teaching aids and notes;

(g) Personal souvenirs, gifts and presents belonging to plaintiff;

(h) Copyrighted manuscript.

Most of the above-listed articles are purely personal to plaintiff in terms of ownership and rights of possession, and do not constitute in any manner official records or property of the State of California.

Plaintiff was never given an inventory of said articles by defendants, and to this date has not obtained the return of said articles. Defendants made copies of many of these articles, circulated them to other faculty members and other persons, and used these articles and materials to investigate plaintiff as well as other colleagues of plaintiff associated with him.

9. On or about August 3, 1982, defendant O'CONNOR also ordered the residents and students who had been under plaintiff's supervision, to refrain from calling or visiting Dr. Ortega in his private home, which home had been used by plaintiff, with official approval, as an off-campus training site, or from contacting plaintiff in any manner.

10. On or about September 14, 1981, and amended on October 26, 1981, a Notice of Punitive Action was served upon plaintiff by defendant O'CONNOR, notifying plaintiff that he was being dismissed from his position as Chief of Professional Education, effective September 22, 1981. Plaintiff thereafter appealed said termination and represented himself in *pro per* in a hearing held before the State Personnel Board commencing on October 29, 1981. During the course of said hearings, on or about October 30, 1981, defendant RUBIN, representing defendant O'CONNOR and the State of California, threatened plaintiff that if plaintiff utilized the testimony of a Dr. Joyce Sutton, a former student and subsequent personal friend of plaintiff's, defendant RUBIN would introduce in cross-examination highly personal evidence to impeach Dr. Sutton found in plaintiff's belongings when they were seized from plaintiff's office. A copy of the letter from defendant RUBIN, dated October 30, 1981, threatening to "offer rebuttal evidence which is in our possession" if Dr. Sutton's testimony was caused by plaintiff, is attached hereto as Exhibit C and incorporated herein by reference. Plaintiff, refusing to yield to this blatant, illegal and unethical attempt at coercion by defendant RUBIN, called Dr. Sutton as a witness on his behalf, and thereafter on November 17, 1981, defendant RUBIN executed his threat as alleged above by introducing into evidence a personal photo-

graph of Dr. Sutton, a Valentine to plaintiff, and a book of poetry given to plaintiff nearly 10 years ago, placing said personal items into the official record as Exhibits.

11. During the defendants' attempt to obtain or create evidence which they could use for grounds to terminate the 17-year employment tenure of Dr. Ortega, on or about July 30, 1981, defendants OWEN and DONOVIEL conspired with each other and with defendants O'CONNOR and FRIDAY to alter a one-month leave of absence issued by plaintiff to one Richard Vaughn, a resident under plaintiff's supervision, which leave would have been legal as issued for a one-month period, to a 6-month leave of absence, which was beyond the legal authority of plaintiff. Said change of date was done for the purpose of obtaining false evidence against plaintiff in support of his termination, and was done without plaintiff's knowledge or permission.

12. Because of the above recited acts, plaintiff has been subjected to the deprivation by the defendants, under color of law, and of the customs and usages of the State of California, of rights, privileges, and immunities secured to him by the Constitution and Laws of the United States and particularly his rights to be free from illegal search and seizure, and from illegal and unwarranted invasion of privacy, guaranteed by the Fourth Amendment to said Constitution; his right to be free from unlawful deprivation of property without due process of law, guaranteed by the Fifth and Fourteenth Amendments to said Constitution; his rights to freedom of speech and association guaranteed under the First Amendment to said U.S. Constitution; his rights reserved or retained under the Ninth and Tenth Amendments to said Constitution; and plaintiff's right to equal protection of the laws guaranteed under the Fourteenth Amendment.

13. Plaintiff alleges that in doing the acts and things above complained of, the defendants were conspirators engaged in a scheme and conpiracy designed and intended to deny and deprive him of rights guaranteed to plaintiff under the Constitution and laws of the United States and particularly those hereinabove enumerated.

14. As the direct consequences and result of the acts of defendants hereinabove complained of, plaintiff was deprived of his property for a substantial period of time; suffered much anxiety and distress over the personal items illegally seized, and much discomfort and embarrassment; plaintiff's reputation was impaired; the intended confidential communications from clients and friends were abruptly violated; the defense of plaintiff's termination from employment was impaired and prejudiced; and plaintiff was irreparably damaged in his career and in his esteemed relationships with colleagues, students, friends and family members. Said actual damages are valued in the amount of $250,000.00.

15. In planning, directing, undertaking and performing the acts alleged above, defendants' actions and conduct were wilfull, malicious and in gross disregard for the rights of plaintiff. Plaintiff is therefore entitled to punitive damages in the amount of $500,000.00.

COUNT II

(PENDENT STATE CLAIM: INVASION OF PRIVACY)

16. Plaintiff hereby incorporates by reference Paragraphs 1 through 15, inclusive, of Count I, above.

17. The seizure, deprivation, and use of plaintiff's articles and belongings by defendants as alleged above was without the knowledge or consent of plaintiff, and constitutes a violation of plaintiff's right to privacy as guaranteed under Article 1, Section 1 of the Constitution of the State of California. By reason of such acts, plaintiff was held up to public ridicule and his privacy was invaded, and he was humiliated and made to suffer embarrassment, to his damage in the amount of $250,000.00.

WHEREFORE, plaintiff prays that judgment be entered against each and every defendant, and that plaintiff be awarded the following relief:

PURSUANT TO FIRST AND SECOND COUNTS

1. An injunction be granted against defendants' unlawful practices and custom of seizing and holding the private property of state employees without a search warrant, court order or other vestige of due process;

2. Actual damages be awarded to plaintiff in the amount of $250,000;

3. Punitive damages be awarded plaintiff in the amount of $500,000;

4. Reasonable costs and attorneys' fees be awarded plaintiff; and

5. Such additional or alternative relief be awarded as may appear to the Court to be equitable and just.

PLAINTIFF DEMANDS TRIAL BY JURY

DATED: July 29, 1982.

GILBERT T. GRAHAM

RAUL S. PICARDO
Attorneys for Plaintiff
MAGNO J. ORTEGA

EXHIBIT R

California — Department of Developmental Services

memorandum

To: Magno Ortega, M.D. — Date: July 30, 1981

Subject: Management Investigation

D. M. O'Connor, M.D.
Executive Director
From: Napa State Hospital

This memo is to confirm our meeting this morning and my expressed intentions to investigate management practices of your department. During the period of the investigation I will honor your request not to be placed on administrative leave given the fact that you are willing to go on two weeks vacation.

In this regard your vacation is to commence at the start of business on July 31, 1981 and *you are to remain off-grounds during the two-week period* unless you have my written approval otherwise. If you have any questions about the investigation or the conditions thereof, call my office and I will clarify issues as needed.

DMO: rmc

cc: Mr. Friday

EXHIBIT A

Dept. of Developmental Services
NAPA STATE HOSPITAL
IMOLA, CALIFORNIA 94558
( ) 253-5000
(707) 253-5768

August 14, 1981

CONFIDENTIAL

Magno J. Ortega, M.D.
P.O. Box 3265
Imola, Calif. 94558

SUBJECT: Administrative Investigation of Professional Education Dept.

Dear Doctor Ortega:

This is to inform you that the administrative investigation of Professional Education is not completed. In order to complete the investigation in an objective and open atmosphere, I am placing you on Administrative Leave with pay. The Administrative Leave is to commence at 0800 on August 17, 1981. You will remain on Administrative Leave until the investigation is completed and I have had the opportunity to consider the findings and reach a decision. Two weeks ago, you requested, in writing, a two week vacation. I would consider a request to extend your vacation, if such a request is received.

In order for the investigation to be completed in a timely fashion, it will be necessary for the Review Team to have an interview with you. Please contact Tom Laskay or Jim Arnold at your earliest convenience.

Sincerely,

D. Michael O'Connor, M.D.
Executive Director

DMO:sa

3 copies mailed to: P.O. Box 3265, Imola, Calif.
1239 Thompson Ave., Napa, Ca.
Professional Education Dept., NSH

EXHIBIT B

SAN FRANCISCO CA
(415) 557-2544

State of California

Department of Justice

George Deukmejian
(PRONOUNCED DUKE-MAY-GIN)

Attorney General
(415) 557-2004
October 30, 1981

Magno J. Ortega, M.D.
1239 Thompson Avenue
Napa, California 94558
Dear Dr. Ortega:

At the conclusion of the hearing on October 29, 1981, you handed me two statements. In my view, this did not constitute a timely response to our written request to you that you provide us with documents you intend to introduce into evidence. I might add, parenthetically, that you still have not complied with our demand that you provide us with the names and phone numbers of your witnesses.

I note that the declaration authored by Joyce Sutton was apparently sent to the Hearing Officer prior to the hearing. This procedure is improper, particularly since no copy was sent to this office. Moreover, if you intend to introduce that document we will be compelled to offer rebuttal evidence which is in our possession. Because of your tardy response to our request, we have been unable to ascertain which documents will be needed to counter Dr. Sutton's declaration. In the interest of fairness, however, we are hereby informing you that we do have relevant evidence bearing on Dr. Sutton's credibility and we do intend to use it should it be necessary.

EXHIBIT C

Finally, if you do introduce the declaration of Dr. Sutton, please so inform us by telephone so that we can subpoena her for cross-examination.

Very truly yours,

GEORGE DEUKMEJIAN
Attorney General

ASHER RUBIN
Deputy Attorney General

AR:gr
CC: James Waller, Hearing Officer

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Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MAGNO J. ORTEGA, *Plaintiff,* vs. DENNIS M. O'CONNOR, EXECUTIVE DIRECTOR, NAPA STATE HOSPITAL, et al., *Defendants.*	**NO. C 82-4045 JPV** **NOTICE OF HEARING**

PLEASE TAKE NOTICE that on April 10, 1984, at 10:00 a.m., in the Courtroom of the Honorable J. P. Vukasin, Jr., Judge of the United States District Court, a hearing will be held on the motion of plaintiff MAGNO J. ORTEGA for partial summary judgment and/or specification of facts without substantial controversy.

DATED: March 13, 1984.

GILBERT T. GRAHAM
Attorney for Plaintiff

(Declaration of Service by Mail omitted)

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Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MAGNO J. ORTEGA

Plaintiff,

vs.

DENNIS M. O'CONNOR, EXECUTIVE DIRECTOR, NAPA STATE HOSPITAL, et al.,

Defendants.

NO. C 82 4045 JPV

DECLARATION OF MAGNO J. ORTEGA

I, MAGNO J. ORTEGA, hereby declare:

1. I have personal knowledge of the facts set forth herein, and if called as a witness could competently testify as to the facts set forth herein.

2. I am a psychiatrist admitted to practice medicine in the state of California. From March 1964 until September 22, 1981, I held the position of Chief of Professional Education at Napa State Hospital.

3. My duties at the hospital included supervising psychiatric interns and residents; planning educational programs; procuring educational materials for students; evaluating the progress of students; teaching classes; and other duties.

4. I had the same private office in the suite for Professional Education located on the hospital grounds for the 17 years I worked at Napa State Hospital. It was a private office, opening onto a corridor which ran between my office and the office in which the secretaries were located. My name was on the door of said office. The door locked to said office, and it was kept locked at all times when I was not working therein. To the best of my knowledge, I was the only person who had a key to my office. During my 17 years at Napa State Hospital, until the break-in which occurred near the end of July, 1981, no one ever entered my office without my permission and consent, to the best of my knowledge.

5. The only State property which was in my office was a desk, filing cabinets, book cases and chairs. All of the other books, records, papers and personal articles belonged to me in my private capacity. All of the official records pertaining to the Education Department were kept in the secretaries' office.

* * * * * *

21. The articles, possessions, and belongings seized by defendants and withheld from me include, but are not limited to, the following:

(a) Purely personal correspondence from friends and family.

(b) Photographs of friends, acquaintances, and family.

(c) Medical files and correspondence from private patients unconnected to Napa State Hospital.

(d) Appointment books and personal notes, as well as official appointments.

(e) Personal financial records and accounts.

(f) A file approximately 18 feet long of IBM cards containing teaching aids and notes.

(g) Personal souvenirs, gifts and presents belonging to plaintiff.

(h) Copyrighted manuscript.

22. I was never given an inventory of said articles that defendants seized, and to this date have not obtained the return of said articles. Defendants made copies of many of these articles, circulating them to other faculty members and other persons, and used these articles and materials to investigate me as well as to investigate other colleagues associated with me or supporting me.

23. I appealed the Notice of Punitive Action and represented myself in pro per in a hearing held before the State Personnel Board, commencing on October 29, 1981. During the course of said hearing, on or about October 30, 1981, defendant Asher Rubin, the Deputy Attorney General representing defendant O'Connor and the State of California in the hearings, threatened me directly that if I utilized the testimony of a Dr. Joyce Sutton, a former student and subsequent personal friend of mine, that defendant would introduce in cross-examination highly personal evidence to impeach Dr. Sutton found in my belongings when they were seized from my office during the break-in. A copy of said letter from defendant Rubin, dated October 30, 1981, threatening to "offer rebuttal evidence which is in our possession" if Dr. Sutton's testimony was used by me, is attached hereto as Exhibit J and incorporated by reference.

24. I refused to yield to this blatant, illegal and unethical attempt to coerce me by unconstitutional means, and called Dr. Sutton as a witness on my behalf. Thereafter, on November 17, 1981, defendant Rubin executed his threat by introducing into evidence a personal photograph of Dr. Sutton, a valentine to me from her, and a book of poetry given to me nearly 10 years ago, placing said personal items into the official records as exhibits. A copy of said photograph is attached hereto as Exhibit K and incorporated by reference.

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NANCY S. WAINWRIGHT
Deputy Attorney General
6000 State Building
San Francisco, California 94102
Telephone: (415) 557-2879

Attorneys for Defendants O'Connor, Owen, Friday, Donoviel & Rubin

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MAGNO J. ORTEGA, *Plaintiff,* v. DENNIS M. O'CONNOR, et al. *Defendants.*	**NO. C 82 4045 RHS** **NOTICE OF MOTION FOR SUMMARY JUDGMENT** **DATE: April 10, 1984** **TIME: 10:00 a.m.** **COURT: Honorable J.P. Vukasin**

PLEASE TAKE NOTICE that on April 10, 1984 at 10:00 a.m. in the Courtroom of Honorable J.P. Vukasin, Jr., Judge of the United States District Court, a hearing will be held on the motion of defendants Owen, O'Connor, Rubin, Friday and Donoviel for summary judgment. The motion will be based upon this notice, the attached motion and memorandum of

points and authorities in support thereof, and on all other pleadings and papers currently filed in this action.

DATED: March 13, 1984

NANCY S. WAINWRIGHT
Deputy Attorney General

Attorneys for Defendants
O'Connor, Owen, et al.

(Declaration of Service By Mail Omitted)

JOHN K. VAN DE KAMP, *Attorney General of the State of California*
NANCY S. WAINWRIGHT
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350 McAllister Street Rm. 6000
San Francisco, CA 94102
Telephone: (415) 557-2879

Attorneys for Defendants Dennis M. O'Connor, et al.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MAGNO J. ORTEGA, *Plaintiff,* v. DENNIS M. O'CONNOR, EXECUTIVE DIRECTOR, NAPA STATE HOSPITAL; RICHARD FRIDAY, BUSINESS MANAGER, NAPA STATE HOSPITAL; DOROTHY OWEN, PERSONNEL, NAPA STATE HOSPITAL; STEFAN DONOVIEL, CLINICAL DIRECTOR, NAPA STATE HOSPITAL; ASHER RUBIN, DEPUTY ATTORNEY GENERAL, STATE OF CALIFORNIA, *Defendants.*	**NO. C 82-4045 JPV** **DECLARATION OF RICHARD FRIDAY**

I, RICHARD FRIDAY, declare as follows:

1. I am the Hospital Administrator at Napa State Hospital.

2. Prior to the time in August 1981 when Dr. Ortega removed the computer located in the Department of Professional Education, I was not aware that Dr. Ortega had removed the computer to his home. It was and is my understanding that the computer was the property of Napa State Hospital.

I declare under penalty of perjury that the foregoing is true and correct and that I am competent to testify thereto.

Executed this day of March, 1984 at Napa, California.

RICHARD FRIDAY, *Declarant*

JOHN K. VAN DE KAMP, *Attorney General of the State of California*
NANCY S. WAINWRIGHT
Deputy Attorney General
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San Francisco, CA 94102
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Attorneys for Defendants Dennis M. O'Connor, et al.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MAGNO J. ORTEGA,

Plaintiff,

v.

DENNIS M. O'CONNOR, EXECUTIVE DIRECTOR, NAPA STATE HOSPITAL; RICHARD FRIDAY, BUSINESS MANAGER, NAPA STATE HOSPITAL; DOROTHY OWEN, PERSONNEL, NAPA STATE HOSPITAL; STEFAN DONOVIEL, CLINICAL DIRECTOR, NAPA STATE HOSPITAL; ASHER RUBIN, DEPUTY ATTORNEY GENERAL, STATE OF CALIFORNIA,

Defendants.

NO. C 82 4045 JPV
DECLARATION OF SHIRLEY CIRAULO

I, SHIRLEY CIRAULO, declare as follows:

1. I am an employee of Napa State Hospital in the Professional Education Department. My job title is stenographer.

2. I have performed secretarial functions for the Department of Professional Education since 1974.

3. My office is located adjacent to the office which was, up until August 1981, occupied by Dr. Magno Ortega.

4. I observed that it was Dr. Ortega's custom and practice to lock the office he occupied in the evening when he left, and to unlock it in the morning when he arrived. He left the door ajar during the day.

5. The files of residents working in the Department of Professional Education were kept near my desk. When Dr. Ortega wanted access to them he would ask for a file and, on occasion, remove the resident file to his office.

6. The lock on the office occupied by Dr. Ortega was changed on or about August 17, 1981. The office was sealed by hospital police.

7. After the office was sealed, it was necessary to enter the office on very few occasions to retrieve state hospital correspondence. On those occasions I was required to contact Hospital Protective Services for entry into the office and I was required to have Officer Jim Stratton present while I retrieved that State hospital record/correspondence.

I declare under penalty of perjury that the foregoing is true and correct and that I am competent to testify thereto.

Executed this 27th day of March, 1984 at Napa, California.

SHIRLEY CIRAULO, *Declarant*

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

BEFORE: The Honorable John P. Vukasin, Jr., Judge

MAGNO J. ORTEGA, *Plaintiff,* vs. DENNIS M. O'CONNOR, EXECUTIVE DIRECTOR, NAPA STATE HOSPITAL, et al., *Defendants.*	**NO. C 82-4045 JPV** **SAN FRANCISCO, CALIFORNIA**

REPORTER'S TRANSCRIPT

THURSDAY, MARCH 29, 1984

APPEARANCES:

FOR THE PLAINTIFF: GILBERT T. GRAHAM, ESQUIRE
PHILIP FRIEDMAN, ESQUIRE
240 Stockton Street, Suite 300
San Francisco, California 94108

FOR THE DEFENDANTS: JOHN K. VAN DE KAMP
Attorney General
State of California
6000 State Building
San Francisco, California 94102
By: Nancy S. Wainwright
Deputy Attorney General

REPORTED BY: LAWRENCE J. WHITE, CSR

It appears the Chenkin versus Bellevue Hospital Center case tells us there are three factors as the test of reasonableness in the area of administrative searches. One, strength of the public necessity for the search; two, the efficacy of the search; three, the degree and nature of the intrusion upon the individual.

Strength of the public necessity is the first one. I think public necessity involves a need to secure the office of the facility, particularly when something apparently already has been removed and they have an ongoing concern to the administration to prevent repetition of similar conduct.

It is reasonable to surmise the defendants were concerned about other state property.

As far as the search and seizure, is it efficacious? Under the Chenkin Standard, the objective was attained. State property was secured. Contents of the office were removed so that subsequent to plaintiff's termination the office could be used by another employee.

The fact that personal items were also seized appears less invidious in view of the fact that plaintiff could have come to the hospital to secure his effects and apparently did not do so.

Seizure of personal effects may seem overly intrusive, but the degree of intrusion was minimized, once again, by the consideration of the plaintiff was aware of the investigation and could have participated.

In view of the foregoing, defendants' motion for summary judgment as to plaintiff's 1983 claim is granted.

As to Section 1985 claim, such claim must allege a conspiracy to deprive a plaintiff of constitutionally guaranteed rights based on defendants' racial or class-based animus.

The only allegation of conspiracy has to do with the alleged alteration of dates and the suspension notice.

In addition to being conclusory, there is no allegation of racial or class-based animus, which I think is defective to this claim. Therefore, the defendants' summary judgment as to 1985 claim is granted.

Pendant claims. The plaintiff alleges in two counts of his complaint, in two causes of action, he alleged pendant state claims, except that he does not even attempt—apparently did

not even attempt to present his claim to the state Board of Control.

There are cases which say that substantial compliance is sufficient. Compliance in a strict fashion is not necessary.

But we don't have that kind of situation here. We have here a situation where he has not even attempted to present his claim to the state Board of Control. Therefore, his claim of pendant state claims may not be asserted before this court.

I have already indicated what my ruling will be as to the dismissal of the Attorney General.

The end result of what I have just stated is that I am denying defendants' motion to dismiss on the grounds of res judicata or collateral estoppel, but the sum and substance of my individual ruling is I am granting the defendants' motion for summary judgment on all of plaintiff's causes of action.

MS. WAINWRIGHT: Thank You, Your Honor.

MR. GRAHAM: Your Honor, just for clarification, a couple of points: I am not arguing your decision, which you have already made, but you indicated the State property was secured.

Can you indicate what State property you believe was secured by the search?

THE COURT: The office. The State's contents in that office.

MR. GRAHAM: The second question is you state that plaintiff could have participated.

THE COURT: I'm under the impression he could have participated in the division of the property.

MR. GRAHAM: I don't believe there is any proof before your Honor on that. There is no affidavit or declaration.

THE COURT: Ms. Wainright?

MS. WAINWRIGHT: Your Honor, contained within the depositions there is evidence, and there have been letters attached to those depositions, evidencing the fact that Dr. Ortega was notified that he could come and claim his property both in Mr. Stratton's deposition and in Mr. Friday's deposition. And he was also notified by letter subsequently. And he had been notified by me in those depositions also that he could come and claim his property.

THE COURT: That is after the search.

MR. GRAHAM: The question is the evidence before the court on this motion, not something she heard or saw in deposition.

MS. WAINWRIGHT: In the depositions—

THE COURT: I was under the impression that he could have. If it is erroneous, you may file a motion for reconsideration on my ruling on that basis.

Thank you very much. Court is in recess.

[Hearing concluded]

OFFICE OF THE ATTORNEY GENERAL
OF THE STATE OF CALIFORNIA

IN THE U.S. DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MAGNO J. ORTEGA,
Plaintiff,
vs.
DENNIS M. O'CONNOR,
EXECUTIVE DIRECTOR,
NAPA STATE HOSPITAL, et al.,
Defendants.

NO. C82-4045 RHS

DEPOSITION OF DR. DENNIS M. O'CONNOR

WEDNESDAY, APRIL 27, 1983

sense of going to dinners together for the medical staff or on occasion when I was a resident, he had functions at his home which I attended, but all of the socializing in that essence was business-related.

A. I'd like to ask you some questions about the area of administrative leave in regards to Dr. Ortega. Can you ascertain from your files or from your attorney the date when Dr. Ortega was placed on administrative leave?

Ms. WAINWRIGHT: Was that asked in one of your interrogatories?

Mr. GRAHAM: I don't believe so.

Q. Can you ascertain from that form which is entitled, "Employee Attendance Record," when he was officially placed on administrative leave?

A. From the form and I don't have the official letter in front of me, but from the form, and it coincides with my recollection of the time frame, it was August 17, 1981.

Q. Now, a couple of weeks before that date, did you have a conversation with Dr. Ortega and basically you asked him to go on administrative leave?

A. Yes.

Q. To the best of your recollection, and I will show you a calendar if it helps to refresh your recollection, was that about July 30, 1981?

A. I believe that is correct.

Q. That was a Thursday; is that correct?

A. Again, to the best of my recollection, that is correct, yes.

Q. And to the best of your recollection then on that Thursday when you spoke with him, did you state that you wanted him to go on administrative leave for certain stated purposes?

A. Yes.

Q. What were the reasons why you said that he should go on administrative leave at that time?

A. The reason was that I was going to conduct an investigation of his administrative practices.

Q. Did you say anything else besides that in that conversation with Mr. Ortega?

A. Well, we had a discussion about whether or not the administrative leave was absolutely necessary, and he in fact requested vacation which I granted.

Q. In that conversation, he asked that he be allowed to take the next two weeks vacation time rather than administrative leave; is that correct?

A. That is correct.

Q. Was your original oral request that he go on administrative leave for two weeks or fifteen days?

A. I don't remember if I put that specific a time on it. I did tell him as I previously just testified to, that he had requested that he be on administrative leave pending investigation. And he then asked me for a possibility for a vacation, which I then granted.

Q. Let me show you a memo from you to Dr. Ortega dated July 30, 1981. Basically, that memorandum confirms just what you have stated, namely, that you accepted him taking the next two weeks in vacation rather than in administrative leave; is that correct?

A. That is right.

MR. GRAHAM: Let's mark that one next in order. That should be Exhibit B. And also mark this form that you referred to a little bit earlier, the Employee Attendance Record of Magno J. Ortega as Exhibit C.

(Whereupon, a one-page memo dated July 30, 1981 to Magno Ortega, M.D., from D.M. O'Connor, M.D., was marked for identification as Plaintiff's Exhibit B.)

(Whereupon, the Employee Attendance Record of Magno J. Ortega was marked for identification as Plaintiff's Exhibit C.)

MR. GRAHAM: Q. Dr. O'Connor, on or about August 14th, then did you conclude that the administrative investigation of Dr. Ortega had not been completed and you placed him on administrative leave for the next fifteen days commencing August 17th?

A. Yes.

Q. Let me show you a letter which is to Dr. Ortega from you dated August 14th, 1981, and that is a copy of a letter you sent to him; isn't that correct?

A. Yes, that is correct.

MR. GRAHAM: We will mark that as Plaintiff's Exhibit D.

(Whereupon, a copy of a letter from D. Michael O'Connor, M.D. to Magno J. Ortega, M.D., dated August 14, 1981 was marked for identification as Plaintiff's Exhibit D.)

MR. GRAHAM: Q. Dr. O'Connor, now from these last two exhibits and from your own recollection, I just want to get straight the actual working records of Dr. Ortega.

He was then on vacation from July 30 until and up until August 17; is that correct, on actual vacation time?

A. Well, the week—the vacation started on the 31st and ended on the 14th, and then there was a weekend, the 15th and 16th.

Q. What kind of time would the 15th and 16th be charged to?

A. That's just weekend time. It's not charged to anything.

Q. That was not vacation? You don't get charged for vacation on the weekends?

A. Right.

Q. So, he would be just paid on his regular salary basis?

A. Yes.

Q. And his regular commenced on August 8?

A. Yes.

Q. When did it terminate?

A. I am not certain, but looking at the Employee Attendance Record, the last noted date that I can detect is that it ended on September 22, but I am not positive. I don't see the memo that I sent and I don't know where it is.

Q. In your letter of August 14, 1981, which is Exhibit D, you indicated that he remained on administrative leave until the investigation was completed; is that right?

A. Yes.

Q. And you believe that from the Employee Attendance Record it continued until what date?

A. From this, again, I am not sure because I don't have the memo in front of me and I don't remember the exact date, but the date here is September 22nd.

Q. So, you do have a memo that would reflect that, is that right, in your files?

A. Right.

Q. Is an employee paid while they are on administrative leave?

A. That's on the option of the appointing authority.

Q. Was he paid? During that period of time, who was the administrator?

A. I chose.

Q. He was paid up until what date?

A. To my understanding again, I am just going from memory because I don't have the documents in front of me, and my memory of it was he was paid until the date of termination.

Q. What date was that?

A. I don't recall.

Q. Does that appear from the records that you have or anything that you have?

(pages 8-12)

* * * * *

A. No.

Q. Did you know it at the time you placed him on administrative leave?

A. No.

Q. Now, what specifically were the reasons supporting your conclusion that you were justified in putting Dr. Ortega on administrative leave when you did so in August of 1981?

A. Specifically they revolved essentially around concerns of what my hospital administrator felt were violations of contractural procedures, had to do with the obtaining of a computer by means which seemed to be cloudy at best at that time, had to do with an allegation by one of the doctor's supervisees that the residents had coerced to provide donations to purchase a computer which I thought had been donated by a company, and also had to do with—

Q. Excuse me. Did you say buy a computer or buy a printer?

A. Buy a computer.

Q. Fine.

A. Also, what seemed at the time had been what occurred —you are asking me about the start of it?

Q. Yes.

A. That the allegation that the person had been put on a leave of absence without their will and without going through the personnel office, and basically administrative things.

Q. What documents did you review when going over these allegations prior to placing Dr. Ortega on administrative leave?

A. I reviewed documents that had to do with the purchase of computer equipment. I am not that familiar with computer language, so I don't recall the names of it. I reviewed documents that had to do with my thanking people for donating a computer. A letter that was written by a resident complaining about some administrative matters that I have just mentioned.

Q. Who is that resident?

A. Dr. Richard Von. And I also reviewed off and on for a period of weeks some contractural—some contracts, consultant contracts that my hospital administrator had been very concerned about.

Q. Some consultant contracts?

A. Yes.

Q. Who was concerned about it?

A. My hospital administrator.

Q. Who was that again?

A. Dick Friday.

Q. Anything else?

A. Those covered the basic administrative areas of concerns to me at that time.

Q. Do you have any of those documents with you today?

A. No.

Ms. WAINWRIGHT: Once again, I will explain that these have been produced to Dr. Ortega on September 24, 1981. They were mailed again on October 11, 1981, and the list of them have been provided to you.

MR. GRAHAM: Well, we are really at a loss because we don't know what documents you are talking about.

MS. WAINWRIGHT: They were identified in my response, supplemental responses to interrogatories, and there is a declaration from Dorothy Owen.

MR. GRAHAM: Q. We will refer to that if you want to give us a copy of that or we can use my copy.

Doctor, tell us which of these doctors prior to placing Dr. Ortega on administrative leave—

A. I remember invoices for the consultation services, looking at the contract requests.

Q. You'd better identify them specifically and read the whole thing.

A. Now, this is prior to the investigation but when I put him on leave?

Q. Yes.

A. Invoices for consultation services of Dr. Saeedi, seven; contract for Mr. Saeedi from 3/26/81 to 6/30/81, $85 a day; contract for Mr. Saeedi from 7/1/81 to 6/30/82, $150 per day. There is the sub-purchase order MODEM and timer; sub-purchase order for disc, Monito and Applewriter; letters from Dr. O'Connor, To Whom It May Concern, to thank contributors for acquisition of Apple computer; a letter from Dr. O'Connor to Mr. Ahmad Manshouri for donation of Sellum II printer and associated hardware; a letter from Dr. Vaughn dated 7/28/81; a memo from Dr. Ortega to Dorothy Owen regarding Dr. Vaughn; and a memo from Dorothy Owen to Dr. O'Connor regarding Dr. Vaughn. That is basically the material I recall that I saw that is on that list prior to the meeting.

Q. So, you were concerned about the computer? What were your concerns about the computer primarily?

A. Primarily around the issue of how the computer was obtained and under what circumstances. I don't know if you ever worked in State service, but until very, very recently, in fact, there were real concerns by the bureaucrats in Sacramento around the acquisition of computers or—it's a very sensitive thing for us managers, so that is kind of a backdrop and I was concerned about that initially.

Q. You are saying the manner of acquisition, that was your concern?

A. I don't know how to put this exactly. There is real scrutiny by people who work in Sacramento, Department of

General Services, and our departments, but my specific concern was essentially that Dr. Ortega led me to believe that a computer had been donated to the hospital when in fact, as these events unfolded, it became very clear to me that that was not the case. The company was not in fact given—again we are talking about before the investigation, and it seemed to be in process around acquiring this computer. That was very bizarre with me. I couldn't understand exactly what it was. In light of the fact that Dr. Ortega asked me to sign letters thanking to whom it may concern which in my impression, from what

(pages 18-21)

* * * * *

Ms. WAINWRIGHT: Again, object to the question.

MR. GRAHAM: Are you telling him not to answer?

Ms. WAINWRIGHT: That is correct.

MR. GRAHAM: This is going to be a very long proceeding the way you are going. Really, you are going to have days of depositions.

Ms. WAINWRIGHT: Is that a threat?

MR. GRAHAM: That is just a statement. This thing was to take two hours, and this is going to take days. I am narrowing down to the allegations. I want to know about this lawsuit. You can't get away with these objections. They are going to laugh you out of court on them.

Ms. WAINWRIGHT: Fine.

MR. GRAHAM: Q. When did you then commence the investigation of Dr. Ortega?

A. I believe it was very shortly after the meeting that he had and I had when he went on vacation, and probably that was, if my recollection is correct, it was on a Thursday. No later than that following Monday, and I can't remember precisely if we started the very next day, but it was very shortly after he went on vacation.

Q. What did the investigation involve?

A. Well, the investigation involved essentially looking into the major areas that I discussed. That was the focus of it.

Q. Who conducted the investigation?

A. I had an accountant, Mr. Arnold, because he was familiar with contractural issues. He was one of the people I

selected. We have a hospital police officer who is an investigator also, and I had him involved in it since he is one of my investigators.

Q. What is his name?

A. I am blanking out on his name, now. Jim Stratton. And then since some of the allegations involved medical residents, psychiatric residents, and since Dr. Ortega is a physician, I put Dr. Laskay on the investigating team because he is a physician in the office of program review. There were three people that conducted the investigation.

Q. What was the name of the first one?

A. Dr. Laskay, Dr. Arnold and Jim Stratton.

Q. Did they produce a written report?

A. Not an official written report, but we had a series of meetings in which they briefed me on the progress of the investigation and the witnesses that they had talked to, people they had contacted and so forth.

Q. Are there any other notes reflecting the contents of those meetings?

A. Yes. In fact, I think this came up in the personnel board hearing that Dr. Laskay had taken some notes during the meetings with the residents.

Q. Do you have copies of those notes?

A. No.

Q. Do you have any in your files?

A. His personal notes? No.

Q. Are there any notes besides his personal notes?

(pages 26-27)

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tion. I am not sure if you are thinking about a certain specific form or—

Q. Are you aware that the residents sent a letter asking for justification for the State to purchase a computer sometime in March of 1981?

A. No.

Q. When were you first aware that the computer had been purchased?

Ms. WAINWRIGHT: I am going to object. I don't think that he was aware that it had been purchased.

MR. GRAHAM: Q. All right. Obtained?

A. I am not really sure to be honest with you. There was a lot of concern around the training and the contracts, and I became aware that a computer had been obtained for the hospital in mid-April, 1981, and Dr. Ortega told me that that computer had been donated to the hospital. I remember I was very surprised that somebody would donate a very expensive piece of equipment to the hospital. So surprised, that I even signed thank you notes thanking them for their contributions.

Q. Did you sign these statements in April?

A. It must have been the Wednesday before the Boston Marathon, April 19 of that year.

Q. When you say expensive piece of equipment, the computer itself only cost about fifteen hundred, didn't it?

A. We have different ideas of expensive. I don't have any carpets on my floor and I think it was a $2,000 piece of equipment and very expensive for hospital managers.

Q. Weren't you pleased to hear then that the residents had obtained the use of the computer?

A. I wish that they had. They haven't even seen it for two years.

Q. They did have it in the Spring of 1981?

A. They had it for a few weeks, yes.

Q. Didn't they have it until you began termination procedures against Mr. Ortega?

A. Well, they had it until Dr. Ortega removed it in mid-August, yes.

Q. Were you aware that Dr. Ortega had had removed the computer at other times for the weekend before he removed it in August?

A. I don't think so. I am not sure if that came up at the hearing or not. The first time I was aware that it had been removed to his home was when it disappeared over the weekend.

Q. When did Dr. Ortega take the computer home in the times that you are talking about now?

A. You mean the time that I am aware of?

Q. Yes.

A. I believe it was on the weekend of August the 15th and 16th, and I don't know whether it was the Saturday or the

Sunday, but it was over that weekend between his vacation and the start of his administrative leave.

Q. When were you first aware that he did take the computer home?

A. I believe it was on Monday, August 17th.

Q. How did you become aware of it?

A. One of the hospital officials came to my office and told me that the computer was missing, and that Dr. Ortega had called in to his secretary and said that he had come in and taken it.

Q. Do you know about what time it was when you were informed of that?

A. No.

Q. Who was the person that informed you?

A. I am not sure. I don't remember which hospital official it was.

Q. Do you have any notes or documents that would indicate who that was?

A. I am not sure about that.

Q. Do you think it's possible that you would?

A. It's possible, yes.

Q. Do you have any recollection, even general recollection, that there might be some documents that would say that?

A. What I remember is again being very surprised and asking the people to look around, maybe it had been misplaced. People looked around and Dr. Ortega called and told the secretary that he came in and took it. I vaguely remembered that there was a memo written. I do remember that we considered it a theft at that time because the ownership of the computer—I thought it was ours. We conducted what we would normally do on a piece of expensive equipment, stolen from the hospital, and conducted

(pages 32-34)

* * * * *

removed the computer from the hospital one of the grounds for which he was terminated?

A. No.

Q. Were all of the grounds for which Dr. Ortega was terminated specified in his letter of termination?

A. Yes.

Q. At some point in time, did you have anything to do with people entering Dr. Ortega's office and going through some of his possesssions?

Ms. WAINWRIGHT: Counsel, be more specific. Have anything to do with what? You mean did he do this himself or did he order it? What do you mean?

Mr. GRAHAM: That's what I mean. Did you have anything to do with it?

Ms. WAINWRIGHT: I am going to ask that you be more specific. You question is vague.

Mr. GRAHAM: Q. I don't think you can be more specific than that. Do you understand the question?

A. I think so.

Q. Tell us about that.

A. Only inasmuch as I put together an order that an investigation be conducted. I did not map out the strategy to tell the investigator how to investigate or my accountant how to account. I just told them to investigate.

Q. Who decided to go into Dr. Ortega's office?

A. I am not sure about that.

Q. Do you know when they did go into his office?

A. No, I don't know the date.

Q. Is there a memo reflecting when they went in?

A. Not to my knowledge.

Q. Did you know that they were going to go into Dr. Ortega's office before they did that?

A. Not specifically.

Q. What do you mean by not specifically?

A. Well, I didn't have it on my mind, that part of the investigation, to do this, do that. I didn't have it on my mind when I told the three investigators to investigate.

Q. Were the investigators then who initiated the action to go into Dr. Ortega's office without his permission?

A. I don't know.

Q. You mentioned in your previous answers that you didn't direct the investigation. I inferred that the investigators were the ones that did it? You don't know who went into his office?

Ms. WAINWRIGHT: That wasn't your question.

Mr. GRAHAM: I didn't say it was.

THE WITNESS: I don't know what question I am answering.

MR. GRAHAM: Q. Who went into Dr. Ortega's office?

A. For the purpose of investigation?

Q. For any purpose. We are talking about who went in and unlocked Dr. Ortega's office for the purpose of investigation in regards to his employment and entered it?

MS. WAINWRIGHT: Excuse me.

(Short discussion off the record)

THE WITNESS: My understanding of that was that, again, I am not sure who exactly went in, but my understanding of it was that the investigator, Mr. Stratton, did go into his office to separate the State property from what may have been Dr. Ortega's personal property and also to look for contractural or other kinds of documents that might have been related to the issues that we already discussed in some detail. I don't know of any other person specifically that went into that office.

Q. Do you know whether or not Mr. Stratton had any permission from Dr. Ortega to enter there?

A. No.

Q. You don't know? In fact, he didn't have any such permission; isn't that correct?

A. I don't know.

Q. Did this happen while he was on vacation, meaning Dr. Ortega?

A. Again, I am not sure. I believe that the sorting out of the material did happen during the time Dr. Ortega was on vacation, but I am not positive.

Q. When was the first time you were informed that someone from the hospital had gone into Dr. Ortega's office and gone through his belongings?

A. Well, my recollection of it was—when I became aware of it?

Q. Yes.

A. My recollection was we became very concerned when the computer was missing that this, in fact, we would

(pages 40-42)

* * * * *

Q. What kind of State equipment do you think he might remove other than the computer?

A. I don't know.

Q. Had Dr. Ortega ever removed any State property apart from the computer in the seventeen years he worked for Napa State Hospital?

A. Well, I had information that he had, yes.

Q. Like what?

A. I had information that he in fact had a typewriter or two that belonged to the State.

Q. When were you informed of this?

A. Again, I don't remember.

Q. It was during the termination hearing, wasn't it?

A. So much was said at that time. More than likely, yes.

Q. Are you saying that the fact that Dr. Ortega removed the computer was some sort of justification for somebody going into his office?

A. No.

Q. Was there any connection between them actually?

A. Well, only that as much as you asked me specifically when did I become aware of the issue of Dr. Ortega, and my response was when my hospital administrator informed me of that, that we should change the locks.

Q. You are talking about the locks to Dr. Ortega's office?

A. That specifically.

Q. Had the locks been changed at the time he informed

(page 44)

* * * * *

A. I don't remember if it does or not. I would assume it doesn't but I am not sure. I am sure Dr. Ortega does.

Q. So, I don't quite understand your assumption. It happened after the 17th because he still had a key to the outside office?

A. Well, again, I don't know what locks were changed. I don't know if one lock was changed or several locks were changed. I don't have that information. I know specifically that the locks to his office were changed. Whether or not his other locks were changed as a security measure, I don't know.

Q. Is it your position that the investigators were authorized to go into Dr. Ortega's office without his permission?

A. Can you restate that?

Q. Is it your position that the investigators in regard to Dr. Ortega's employment were authorized to enter his office without his permission?

A. Yes.

Q. What is the reason for that? Why do you think that they were justified?

A. Basically what we were trying to do is to remove what was obviously State records or records that had to do with his program, his department, any of the materials that would be involved in running the residency program, around contracts, around the computer, around the areas that we were interested in investigating, and we wanted to—I felt it was reasonable to have access to what that material might be and also to separate out what was his and for him to get it because we needed office space.

Q. Did you consider asking him doing this for you rather than having somebody go into his office and going through his things without his permission?

A. I specifically did not do that, no.

Q. That was not done so far as you know, correct?

A. So far as I know, it was not done, yes, that's right.

Q. So, as far as you know, only Jim Stratton went into his office?

A. As far as being under sworn testimony, I know of only for certain that Jim Stratton did, and others may have gone in. I only know for sure that Jim Stratton went in.

Q. How many people went into the contents of Dr. Ortega's office at any time?

A. I don't know.

Q. Do you have any idea?

A. See, I have never been in that office since I left the program many years ago. I don't know who was in that office.

Q. In the answers to interrogatories, it specifies several different people who were in there. Do you know where that information came from?

A. Probably from other people who gave testimony.

Q. But you were never even informed of any other persons who looked at the materials in his office except

(pages 46-47)

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the date they were taken until the present date. Thomas Laskay, Richard Friday, and Lewis Langoria."

Do you have any information?

Are you saying that some of these people here did other things than view the documents or review them?

A. Do you mind if I take a look at that because I am trying to be helpful. I think the only thing or person who I didn't mention is Lewis Langoria, and I believe he was at that time, too, and again, I don't know my sense of this, but it has to do with controlling custody, and in fact, I believe Dr. Ortega still has material that is his personal belongings in the control and custody of the hospital. One of our peace officers, probably Mr. Langoria, would be the person who would have custody. What we usually do is have it with one of our peace officers. Mr. Friday is the hospital adminstrator and I have already mentioned the two other people.

Q. But of these two people that we have just named, they have not reviewed or viewed the materials so far as you know?

Ms. WAINWRIGHT: Do you mean viewed in the books or viewed each item or gone through each item?

MR. GRAHAM:

Q. Which of the people listed here in your answers to number 14, so far as you know, has actually read through or looked at the individual possessions and articles that were in Dr. Ortega's office?

A. Read through the individual articles?

Q. At least some of them.

A. At least some of them?

Q. Yes.

A. Which would include one?

Q. Yes.

A. Well, I have. I have looked at least one of them because they were presented at the hearing. I am not sure about Mr. Friday. I know Dr. Laskay has because he was at the hearing. I am not sure about Mr. Arnold. I doubt if Mr. Langoria—I haven't seen the boxes, so I don't know what they are now.

Q. Are you saying that you didn't look at any of these articles before the hearing?

A. No, I didn't say that.

Q. You actually looked at them before the hearing?

A. Yes.

Q. And you looked at some personal possessions of Dr. Ortega?

A. Yes, I did.

Q. And you saw personal letters; is that correct?

A. Well, I did not specifically say what I would consider to be personal letters. I did see a note and a poem.

Q. Did you see any Valentines?

A. Yes, a Valentine.

Q. Did you see any photographs?

A. Yes, a photograph.

Q. Did you regard any of these as personal items or State items?

A. Personal items.

Q. Is it your position that your State has authority to go into and look at State employee's possessions which are in their office without that employee's permission?

A. It's my position that for the purpose of trying to determine what is involved in a State action and what is not, and what is personal and what is private, that is appropriate, yes.

Q. In other words, that the State has the authority to go in and look through all of the person's belongings to see whether they are public property or personal property; is that what you are saying?

A. Yes.

Q. But in fact, some of the personal items were used in the hearing against Dr. Ortega; isn't that correct?

A. Yes.

Q. Who was present when you say these personal items that you just testified to—

A. You mean when I first saw these items?

Q. Yes.

A. I am not positive. I think that to the best of my recollection, it was Mr. Friday. It may have also been Dr. Laskay, but I am fairly sure about that. I don't remember

specifically, but I think those were the two people that showed it to my attention.

Q. How many different occasions did you view these items that were in Dr. Ortega's office?

A. Again, specifically of the items that I have viewed were the ones you just articulated, a Valentine, a picture, and a poem and a book which was a small book. I didn't review anything else or letters or anything else I looked at that initial material on one occasion and then probably once before the hearing, and then during the hearing, it also came up, so probably three different times.

Q. So, the first occasion was with Arnold and perhaps Laskay?

A. No, I said Friday.

Q. Excuse me. Mr. Friday and Laskay? On the second occasion, who was present with you at the time?

A. I believe it was Mr. Rubin and Mr. Laskay, I believe.

Q. Where did that meeting take place?

A. In my office.

Q. How much prior to the termination hearing was that meeting held?

A. Through the hearing themselves?

Q. Yes. How long prior?

A. Pretty close to the hearing. Action had already been taken because Mr. Rubin was our counsel and just before the hearing, I don't recall the exact date of it, though.

Q. Mr. Rubin also had access to these articles and reviewed them?

A. Those several items, yes.

Q. But his name is not listed to this answer to

(pages 49-52)

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through his belongings?

A. Well, again for the purposes of trying to look at the issues around the obtaining of the computer and the contracts and where documents might be placed, if in fact they are State documents on State property, I would assume, yes, he would look to see if those documents exist in his office.

Q. Had this practice of going into doctors' offices have ever been done at Napa State Hospital?

A. I recall an instance in which we found in an office—Well, I am not sure exactly, but there was an episode where we found information in an office that led us to believe that there were reasons for adverse actions.

Q. So, you have gone into somebody's office in another occasion without their permission?

A. I don't recall whether or not we had the permission. I don't know if the person was there or not. This was five or six years ago.

Q. Is it any part of the hospital's rules, regulations that an employee cannot have personal property or belongings in his or her office?

A. There is no rule against that.

Q. Was Dr. Ortega permitted to have private patients?

A. I don't understand the question.

Q. Dr. Ortega's role as Chief of Professional Services at Napa State, was there any prohibition against him handling any private patients on the side?

A. On hospital time or hospital grounds, yes.

Q. Aside from hospital time, how about hospital grounds?

A. No, not on hospital grounds, no.

Q. Were there any files relating to private patients that were discovered in Dr. Ortega's office so far as you know?

A. I believe there was, yes.

Q. Do you know if anybody entered or reviewed the contents of those files?

A. My only recollection of what it was was some billings or something like that and we had wondered whether or not he performed certain duties of private practice on State Hospital time, but we did not pursue that.

Q. You're talking about medical billings?

A. I think so, yes.

Q. Somebody viewed those files, and whether they constituted improper billing—

A. We thought there might be that Dr. Ortega was using his office or State time to conduct other than what his job as Chief of Professional Education was, but again, there was no evidence to pursue that and that was not part of his punitive action.

Q. Did you see the contents of these particular patients relating to the outside?

A. I vaguely recall seeing a bill regarding something medical, but I didn't pursue it.

Q. Do you know if anybody did pursue it?

A. I don't think so, not to my knowledge as far as I

(pages 60-61)

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A. I don't believe so, no.

Q. When was Dr. Ortega's office given to another doctor? In other words, when did a new doctor take over that office?

A. I am not sure.

Q. Do you have a general idea of how long it was after Dr. Ortega had left the hospital?

A. A general idea, I'd probably say weeks as far as somebody actually calling it their office and being in there full time.

Q. Was anybody taking over that office before Dr. Ortega's administrative hearing on his termination were concluded?

A. My recollection of it was the way I asked of one of the physicians who worked in the area with Dr. Ortega to act during the period of time he was on vacation and on administrative leave, and I believe that person had his own office, so I don't know that anybody actually took possession of his office for probably several weeks until we had a more permanent solution or a permanent director of the program who was not this person who was subbing in the interim.

Q. Who made the decision to move into that office? Was it Mr. Friday or someone else?

A. When we chose the Chief of Education, subsequent to Dr. Ortega's dismissal we requested that she have an office, and I think it was at that time that Dorothy Owen was contacting Dr. Ortega to get his boxes of belongings

(page 66)

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the ones that come to mind first, Mr. Stratton and Mr. Friday, to determine which of the overall items should be given to you and perhaps to be reviewed and to be usable in the hearing; is that right?

A. Yes.

Q. Aside from the assertion of Mr. Rubin, there is nobody else that comes to mind besides those two?

A. No.

Q. In the items which were in Mr. Ortega's office, the items and the belongings and articles and so forth, how would you ascertain which of these matters were State property and which were personal property?

A. How would I?

Q. Yes.

Q. Well, I think basically it would be only obvious. For example, most items that the State issues have numbers and they have a little property number marked on them, and we are real careful about the property, so as far as physical items, unless you get down to the pencil or State pen, but basically physical problems start with documents or files. I think that—I can't think of a State document that doesn't either have a form number or sort of a letterhead or a governor's name like this stuff here (indicating).

Q. Because of the letterhead at the top?

A. It has a seal. When you look at that, you know it has something to do with business. You would know it would be State Hospital business without even reading it.

(page 71)

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OFFICE OF THE ATTORNEY GENERAL

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MAGNO J. ORTEGA,
Plaintiff,
vs.
DENNIS M. O'CONNOR, EXECUTIVE DIRECTOR, NAPA STATE HOSPITAL; et al.,
Defendants.

No. C 82-4045 RHS

DEPOSITION OF RICHARD FRIDAY

TUESDAY, JUNE 28, 1983

A. I wasn't involved in any meetings.

Q. Before that time?

A. Right.

Q. How about the time before he went on vacation until he was officially placed on administrative leave, which I think was between July 30th and August 17th?

A. I think there was one or two meetings.

Q. Do you recall whether anyone else was present besides you and Dr. O'Connor?

A. I think Dorothy Owen, the personnel officer, was present.

MS. WAINWRIGHT: O-w-e-n.

MR. GRAHAM: Q. She was present at one meeting?

A. I think so.

Q. At some time in 1981 in regard to the termination of Dr. Ortega was a team of people appointed to be investigators?

A. That's correct.

Q. And who were those investigators?

A. If I recall correctly, I think Jim Stratton, Jim Arnold, and Dr. Laskay.

Q. Who appointed these investigators?

A. If I recall correctly I think Dr. O'Connor did.

Q. Did he obtain any input from you as to who should be the investigator?

A. He asked for my recommendations.

Q. Did you give him any recommendations?

A. I recommended Jim Arnold.

Q. Did you recommend anyone else?

A. I recommended that somebody from John Henry's office should be considered.

Q. That's the security police?

A. That's right.

Q. Was somebody there appointed?

A. That was Jim Stratton.

Q. Did you make any other recommendations?

A. No.

Q. Just those two?

A. Uh-huh.

Q. You didn't recommend Dr. Laskay?

A. No.

Q. Do you recall why you recommended Mr. Arnold?

A. I felt that Mr. Arnold was very expertise in financial matters as well as basic administrative problems.

Q. And you talked to him about it?

Ms. WAINWRIGHT: Who are you referring to?

MR. GRAHAM: Q. Excuse me, you talked to Mr. Arnold about it before he was asked to be an investigator?

A. I asked him if he would be willing to assist if Dr. O'Connor asked him.

Q. He indicated he would?

A. He indicated he would.

Q. Were you aware of any agreements or disagreements between Dr. Ortega and Mr. Arnold prior to the time that the investigation took place?

A. No.

Q. Were you aware whether there were any disagreements between Dr. Ortega and either Dr. Laskey or Mr. Stratton before they were appointed?

A. No.

Q. And you didn't recommend Mr. Stratton himself; is that right?

A. No.

Q. Was that selected by Mr. Henry?

A. That's correct.

Q. And tell us, briefly, the roles that each of these three was supposed to carry out in the investigation?

A. Well, the basic role was to check out any of the statements that had been made regarding sexual harassment, any of the—check out who owned the computer. At least that was basically Mr. Arnold's role. I'm not sure of all the roles that Dr. Laskay had.

Q. Who told these investigators what their duties and roles were supposed to be? Was that you or Dr. O'Connor or someone else?

A. I don't know what Dr. O'Connor told them. I know what I told Mr. Arnold and Mr. Stratton.

Q. Was it your responsibility to tell them what their duties were going to be in the investigation?

A. I think it was, yes.

Q. What did you tell Mr. Stratton to start with?

A. I told Mr. Stratton and Mr. Arnold to try to determine who owned the computer.

Q. Anything else?

A. That I had also asked them to review or check Dr. Ortega's office out in order to separate the business files from any personal files in order to ascertain what was in his office.

Q. And when did you tell them to undertake these particular duties in regard to the administrative leave? Was it before Dr. Ortega was placed on administrative leave, or afterwards?

Ms. WAINWRIGHT: You're speaking of the August 17th date?

MR. GRAHAM: Q. There's a July 30th date when he went on vacation, and an August 17th date on administrative leave.

A. I think it was August 17th.

Q. Was it after that, then? Shortly after?

A. Was August 17th on a Friday?

Ms. WAINWRIGHT: We will go off the record.

(Discussion off the record.)

Ms. WAINWRIGHT: Back on the record. We are assuming that August 17 is a Monday?

MR. GRAHAM: Q. Right.

A. I believe that the vacation time or the vacation/administrative leave time ended on a Friday, and Dr. Ortega was placed then on administrative leave effective the 17th, which was a Monday, if that's what we're assuming.

Q. So this conversation with Mr. Stratton and Mr. Arnold, did that happen then after that Monday?

A. After, that's right.

Q. How close to that date was it?

A. I don't recall.

Q. Was it within a couple of days or so?

A. Within four or five days.

Q. Now, specifically, what did you tell them in regard to going into Dr. Ortega's office and separating the business files from the personal files?

A. Basically I wanted to make sure that we had our state property identified, and in order to provide Dr. Ortega with his property and get what we had out of there, in order to make sure our resident's files were protected, and that sort of stuff.

Q. Was this oral or in writing?

A. Oral.

Q. And who all was present? Just you and Mr. Stratton and Mr. Arnold?

A. Uh-huh.

Q. Was Dr. Laskay present?

A. No, he wasn't.

Q. Was he involved at all in your instructions to do this particular task as far as sorting out the records?

A. I don't recall that he was at that time. I think he did go down there once with Mr. Stratton and Mr. Arnold.

Q. But he was not the recipient of any instructions by you?

A. Not directly from me.

Q. Now, in regard to that particular instruction or directions about going into Dr. Ortega's office did you regard that as a regular part of investigation, or was it more irregular?

A. I considered it regular, because I had done it before when I was a personnel officer at DeWitt. I did call for legal advice before we did it.

Q. And who did you call for legal advice?

A. I called our—I made contact with our attorneys in the department.

Q. Mr. Rebin?

A. No, in our department.

Q. Okay. Did you tell Mr. Stratton and Mr. Arnold how they were supposed to get into the office, into Dr. Ortega's office in order to review the files?

Ms. WAINWRIGHT: I'm going to ask for clarification. Do you mean how they were to—

MR. GRAHAM: Q. Physically enter and so forth?

A. Well, they were provided a key, a special key, and they entered.

Q. And who provided them the special key?

A. I did.

Q. This was a key to Dr. Ortega's own private office in the suite; is that right?

A. To the best professional education director's office.

Q. As I understand it, there is an outside door to the whole department?

A. That's right.

Q. There's a lock on that, right? All the employees that work there have a key to it?

A. That's correct.

Q. And then the individual employees that have an office of their own, a private office, they would have a key to their own office also?

A. They may have a key. It may not be a completely private key, but they would have a key.

Q. And besides an employee such as Dr. Ortega, who else would have a key to their office besides the person who has that office?

A. I don't know who would.

Q. But you would, you would have keys to all of them, right?

A. I would, yes.

Q. And you gave them the key on the same day that you talked to them, a few days after Dr. Ortega had been placed on administrative leave?

A. Something like tha "h-huh.

Q. Did you ask Dr. Ortega whether or not they could enter his office?

A. No.

Q. Did you consider it was not necessary to ask Dr. Ortega?

A. At that point in time, yes.

Q. At some later point in time did you change that opinion?

A. No.

Q. I didn't understand exactly what you meant by "at that point in time." Did that have any particular meaning in your answer?

A. No.

Q. Do you know when in relation to that particular meeting you had with Mr. Stratton and Mr. Arnold that they did enter Dr. Ortega's office to go through his files? In other words, do you know whether it was a few days after that or shortly thereafter?

A. I don't recall. I would say it was probably within a week or so. I'm not sure of the exact date.

Q. Do you know who the people were who entered his office?

A. Yes, I do.

Q. Who were they?

A. To my knowledge they were Dr. Laskey, Jim Stratton, Mr. Arnold, and myself.

Q. Okay. Did you all enter at the same time?

A. No.

Q. Were there separate entries, then, into his office?

A. Yes.

Q. Tell us to the best of your recollection or knowledge how many entries there were and who participated in them?

A. To the best of my knowledge it would be difficult, because I didn't ask Mr. Stratton every time he entered, or

(pages 17-24)

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Q. Did you use this special key to his office to enter?

A. That's correct.

Q. It was just one key, or were duplicates made?

A. No, just one key.

Q. In relation to the date that Dr. Ortega was placed on administrative leave, August 17, approximately when did you enter his office?

A. I'd say probably within five or six days, something to that effect.

Q. Was it during a regular work day?

A. No, it wasn't.

Q. In an evening?

A. It was an evening.

Q. Was anyone else present at the time?

A. No.

Q. Was anyone else present even in the entire department when you went in?

A. No.

Q. What was your purpose in going in?

A. My purpose was to make sure that the work was proceeding in terms of boxing items up, separating things, and so forth.

Q. And who was supposed to be doing that kind of work?

A. That was part of the things that Mr. Arnold and Mr. Stratton were supposed to be trying to do.

Q. Did it appear that this work was proceeding?

A. It didn't look real good, because the office itself was pretty much in—you know, there were just a lot of papers around and boxes and different things.

Q. And what did you do when you went in?

A. I looked it all over, looked in the right file drawer to see if the reports had been taken out of there. And that was about it.

Q. How long were you in there?

A. Probably about 15, 20 minutes.

Q. What reports are you talking about that were in the right file drawer?

A. Well, I was just wanting to see if there were still reports regarding residents that were involved in the training program, whether there were contracts, or other types of items that needed attention, or what was really there.

Q. What kind of items did you see in the office?

A. In the office?

Q. Yes.

A. I saw boxes and I saw records.

Q. Let me ask you first about the right file drawer. What do you recall that was in the right file drawer?

A. I recall basically there were some different notes on residents that Dr. Ortega had worked with. There was one memo or card from one of Dr. Ortega's residents that was in their.

Q. You mean a personal valentine?

A. It appeared to be a personal valentine's card in with other files.

Q. Was that the one that was from Dr. Sutter, Sutton?

A. That's right, Sutton.

Q. What else could you recall? Any other personal letters or correspondence?

A. I didn't get in—there were obviously other things in there, but I didn't proceed to that point.

Q. Were there any financial records that you remember seeing?

A. I do recall seeing some Medi-Cal, something or other regarding Medi-Cal laying someplace around there.

Q. That was a patient file?

A. I think it was.

Q. How many different patient files did you see?

A. I couldn't tell you, because I didn't look that close.

Q. Would you say more than half a dozen?

A. I would say—no, I would say.

MS. WAINWRIGHT: I want you to remember that you're not supposed to guess. If you remember, fine.

THE WITNESS: That's right. You're asking what I saw, and my best estimate, I know I saw less than a half a dozen. And the answer, you asked me: Was it more, and I said no.

MR. GRAHAM: Q. Did you make any notes of your visit there?

A. I didn't make any notes, no.

Q. You didn't do anything in writing to write down what you saw or anything?

A. No.

Q. Did anybody, so far as you know, including Mr. Stratton, Arnold and Dr. Laskay make any inventory of the things that they saw in the room?

A. I believe that Dr.—I believe that Mr. Stratton had started this, but it became so mundane, and so much, that I don't know whether he ever finished or not. I think he finally just tried to decide what was Dr. Ortega's and box it up.

Q. Do you know where his memo is at the present time?

A. No.

Q. Did you actually see the memo?

A. No.

Q. I'm using "memo" loosely here. Did you see any notes or anything from him?

A. No.

Q. What made you think that he did start a list?

A. Because he mentioned it to me.

Q. So he mentioned it to you, but you didn't actually see it?

A. No.

Q. And how about a personal appointment book? Did you see that in Dr. Ortega's office?

A. No.

Q. Did you see a long file full of IBM cards?

A. I don't recall seeing those.

Q. Regarding the patient with the Medi-Cal problem, was there a follow-up to—

MS. WAINWRIGHT: Wait a minute. Could you clarify what you mean by the patient with the Medi-Cal problem?

MR. GRAHAM: Q. Yes. You just mentioned that you saw a file in there regarding some matter regarding Medi-Cal. Was there any follow-up with that particular file by anyone?

A. Mr. Stratton may have done some minor follow-up. I'm not sure.

Q. What do you know about what he tried to do, if anything?

A. I don't.

Q. You say "he may have." What makes you think that?

A. Yes, because I mentioned to him the next day, to him and Mr. Arnold, that I had been there and figured that they should take a look at the Medi-Cal area and so forth.

Q. What did you mean exactly, or what did you say exactly? In other words, what do you mean that they should take a look at the Medi-Cal area?

A. I said there was a Medi-Cal file down there and it looked that it was something not directly related to what Dr. Ortega was doing, and it should be checked out, that's all.

Q. Did he ever report back to you what he had done with that Medi-Cal patient?

A. No, he didn't, no.

Q. Did you hear anything further of it, after that?

A. I did, but I don't recall what it really amounted to.

Q. Do you recall who you heard it from?

A. I think I heard it from the personnel officer?

Q. Dorothy Owen?

A. Dorothy Owen.

Q. Basically, she indicated that there wasn't anything that came from that investigator, that part of it?

A. I don't recall what she said.

Q. Do you recall whether she indicated that there was something further to look into, or there was not?

A. I don't recall what she said.

Q. Were any copies made by anyone of any of the materials that were in Dr. Ortega's office to the best of your knowledge?

A. To the best of my knowledge I certainly didn't make any. I don't know of anyone else making any, but that's to the best of my knowledge.

Q. But you were never informed of anyone who made any copies of anything?

A. No.

Q. Were there any restrictions placed on Mr. Stratton and Mr. Arnold and Dr. Laskay regarding who they could disclose these particular documents and information to that were found in Dr. Ortega's office?

A. It was confidential.

Q. Were they told it was confidential, or you just think they understood that?

(pages 26-31)

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A. I really don't know. Again, it's been over two years. I can't recall.

Q. Can you give us an estimate in regard to the date that Dr. Ortega was placed on administrative leave?

A. Same, two months. It might have been shorter, but again, that's a guess.

Q. Who did that task?

A. I don't know. I don't recall at this point in time.

Q. Do you recall whether you told that person to do it or whether somebody else did?

A. I think I did.

Q. Do you think it was probably Mr. Stratton?

A. I would suspect it was Mr. Stratton, rather than somebody else.

Q. And what was done with the things that were taken out of Dr. Ortega's room?

A. It was boxed up. Dr. Ortega was notified to come and pick it up. It was put in one of our special locked storage areas.

Q. And where is that locked storage area?

A. Well, I'm not sure. It's in—it was in the R&T, Receiving and Treatment, it's where we used to. I'm not sure whether it's been picked up or not.

Q. How many boxes are there, do you know?

A. No, I don't.

Q. Have you ever seen them since they were boxed up?

A. No, I have not.

(page 36)

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Q. When did that take place?

A. Again, to the best of my recollection, it took place when Dr. O'Connor called me and informed me that Dr. Ortega was placed on administrative leave.

Q. So it was on or about the same date?

A. Yes.

Q. In other words, that happened about August 17th, assuming that's the correct day?

A. August 17th, or it could have been even a little earlier. I don't recall, but it could have been.

Q. Did you call the locksmith the same day?

A. Uh-huh.

Q. Did they come out the same day?

A. Yes.

Q. Do you have any receipt or any financial record that would indicate exactly when that took place?

A. We have a locksmith at the hospital, and generally speaking a work order is initiated. But because of my request, in instances like this, I do have the authority to do something like that without fooling around with a work order.

Q. So you didn't have to pay separately for it? You, meaning the Hospital?

A. That's right.

Q. Now, what was the reason that the locks were changed in Dr. Ortega's office so far as you know?

A. The reason primarily was one of securing a building in which there was no longer any person directly responsible for it, to make sure that all State properties were under our control, because we didn't know who had keys to what.

Q. So you had no special fears or suspicion of Dr. Ortega himself, it was just to secure the building generally?

A. To secure the building, including Dr. Ortega or anybody else.

Q. The locks were changed in his office prior to the time he was actually terminated, correct?

A. No. Oh, yes, uh-huh.

Q. And so far as you know has that ever happened before in Napa State Hospital, that they locked somebody out of their office before they were terminated from their job?

MS. WAINWRIGHT: Okay. I'd like a clarification. The locks were changed in Dr. Ortega's office. I don't think they testified that they locked somebody out of their office.

MR. GRAHAM: I will add that if you want.

Q. So far as you know, Dr. Ortega was never given a key to the new lock, was he?

A. No, he never asked for one.

Q. Would you have given him one if he asked for one?

A. No.

Q. So, in fact, he could not enter his office, right?

A. That's right.

(pages 38-39)

* * * * *

A. There were complaints that Dr. Ortega had removed the computer.

Q. But that didn't have anything to do with the decision on entering his room; is that right?

A. No.

Q. Or changing the locks?

A. No. The locks, that decision was already . . .

Q. Already implemented?

A. Implemented, or being implemented.

Q. Let me show you one of the memos that you produced today dated August 26, 1981. Can you just tell us basically what that memorandum is?

A. It's basically a discussion that I had with Dr. Ortega regarding the computer and the consultant contracts, and the equipment to the computer.

Q. And this was concerning the conversation that you had with Dr. Ortega in the course of your investigation?

A. No, at that time there wasn't really an investigation, as I recall.

Q. Now, this involved a meeting that happened on May 28, but the memo is dated August 26th, 1981?

A. That's correct.

Q. Can you tell us why there was such a long delay before the memo was transcribed?

A. I had made some notes, and just some of the discussions that Dr. Ortega and I had had, and that when the other areas of questions came up regarding Dr. Ortega, I put those together as part of the investigation.

(page 45)

* * * * *

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MAGNO J. ORTEGA, *Plaintiff,* vs. DENNIS M. O'CONNOR, EXECUTIVE DIRECTOR, NAPA STATE HOSPITAL, et al., *Defendants.*	No. C 82-4045 RHS

DEPOSITION OF JIM STRATTON

THURSDAY, DECEMBER 1, 1983

REPORTED BY:

BARBARA L. YEE, CSR 3296

A. Approximately 20-22, maybe more.

Q. Okay, all right. So is it acceptable to you and your counsel, then, if Dr. Ortega calls you and makes an appointment in the next week to pick them up?

A. Yes, as far as I am concerned.

Q. Are there any copies that have been made of any of these documents or articles?

A. I don't know of any documents or articles. If you are referring to his personal property?

Q. Any copies that have been made of anything.

A. Not to my knowledge.

Q. Okay. So as far as you know, there is only one set, the original of the articles of documents removed from his office?

A. Just what I removed from his offices there.

Q. Okay. Now, you didn't find any log or summary of what was taken from his office?

A. No, sir, I removed the stuff myself, and I did not make a log or summary of it.

Q. You didn't make any notes or anything?

A. No, I did not.

Q. Did you start to make notes?

A. At the beginning, I started to, then it was superfluous, and I threw everything away and boxed it all up.

Q. What do you mean it was superfluous?

A. There was so much stuff. Trying to sort State from non-State, it was too much to do, so I gave it up and boxed it up.

(page 7)

* * * * *

Q. How long have you been employed there?

A. I was in the Army for two years, and I worked for the Department of Correction for one year, total State service is 19 months.

Q. So you have been at Napa 16 months?

A. Yes.

Q. And what is your position there?

A. Hospital Peace Officer I.

Q. How long have you had that position?

A. Since February of 1979.

Q. And who is your immediate superior?

A. John Henry, Chief of Staff Services.

Q. Is your employer, then, the State of California?

A. Yes.

Q. You are not a private corporation, I take it?

A. No.

Q. And the job title is—you want to give it to me again?

A. Hospital Peace Officer I.

Q. What are your duties as Hospital Peace Officer I?

A. I patrol the grounds, take reports, maintain security of the facility and other jobs specified by my superior.

Q. Okay. Do you ever have any duties that are given to you by any other superior except Mr. Henry?

A. Yes, Mr. Friday.

Q. Okay. And Mr. Friday is Hospital Administrator?

A. Yes, he is.

(page 9)

* * * * *

A. I think I was in my office, which is Protective Services office.

Q. Is that in the same building as Dr. Ortega's office?

A. No, it isn't.

Q. So your best recollection is that Mr. Friday came into your office?

A. Yes, I think so.

Q. What did he say when he gave you the key?

A. I think he gave me the key and told me to sort out the State property from Dr. Ortega's personal belongings.

Q. Did he say why to do that?

A. I believe he said Dr. Ortega was on administrative leave.

Q. Did he say anything else about why you should do it? I don't quite understand. He just said Dr. Ortega is on administrative leave and said search his office?

A. He didn't tell me to search his office; he told me to go down and remove his stuff, sort it out.

Q. Besides saying Dr. Ortega is on administrative leave, did he say why you should do this?

A. I don't recall if he did or not.

Q. Did he tell you to look for anything in particular?

A. Only to separate out between State and personal property.

Q. Did he tell you how to do this, separating the personal property from State property?

A. No. That is why I didn't make any list or anything like that; it was too complicated even for my nimble mind.

Q. Did you have any idea how to do that?

A. No. I just took an overview and I thought, well, I will just box it up, so that is what I did.

Q. Was it difficult to decipher from the things you saw whether they were State or personal property?

A. That is correct.

Q. Why is that? Why was it difficult?

A. When does something become State and when is it personal? I don't know. There were reams and reams and stuff—papers. I didn't stop to read them. I just looked at the heading and if it said Professional Education, I assumed it was State.

Q. How did you assume if something was personal?

A. If it didn't say State of California or Napa State Hospital or Educational Profession.

Q. Did you go over to Dr. Ortega's office the same day you got the key from Mr. Friday?

A. As I recall, yes.

Q. Do you recall what time of day it was? Was it day or night?

A. I can't recall that.

Q. Do you know if your—if you were working days or nights then?

A. I was working daytime.

Q. And that is what, 8:00 to 5:00?

A. 8:00 to 5:00.

Q. And it was during your working shift?

A. Yes, it was.

(pages 41-42)

* * * * *

same day or earlier than that, that you first entered his office?

A. I can't recall. It would be within a reasonable time.

Q. By that you mean what, a day or two?

A. Possibly, yes.

Q. Do you know who changed the locks?

A. I would say it would be the locksmith.

Q. Who is the locksmith that does the work there?

A. Larry Thomason.

Q. Is that T-h-o-m-a-s-o-n?

A. I don't know how you spell his last name.

Q. And where does he work out of? Is he an employee of the State?

A. Yes.

Q. And he is based there at Napa State Hospital?

A. Yes, he is.

Q. Do you use him for other investigations in changing locks?

A. Yes, I have.

Q. Had you ever personally been involved in any other situations like this when an employee's office was entered and the locks were changed?

A. Me, personally, no.

Q. But you have heard of other occasions in which this has been done?

A. That is possible.

Q. What do you mean it is possible? Do you recall?

(page 46)

* * * * *

Supreme Court, U.S.
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No. 85-530

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DENNIS M. O'CONNOR, *et al.*,
Petitioners,

vs.

MAGNO J. ORTEGA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether it is a violation of a government employee's civil rights for government officials to make an administrative inventory of papers in a government office assigned to him while he is undergoing an administrative investigation.

PARTIES BELOW

PETITIONERS: Dennis M. O'Connor, Richard Friday, Dorothy Owen, Stefan Donoviel

RESPONDENT: Magno J. Ortega

INDEX

	Page
OPINION BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND APPLICABLE FEDERAL LAWS	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	5
ARGUMENT	7
NEITHER ENTRY INTO RESPONDENT'S GOVERNMENT OFFICE NOR INVENTORY OF ITS CONTENTS IN THE COURSE OF PETITIONERS' ADMINISTRATIVE INVESTIGATION INTO RESPONDENT'S EMPLOYMENT ACTIVITY VIOLATED RESPONDENT'S CIVIL RIGHTS UNDER 42 U.S.C. SECTION 1983	7
A. At the Threshold, Respondent Has Not Identified A Constitutional Or Other Right Cognizable Under 42 U.S.C. Section 1983	7
B. The Entry Of Respondent's Office And Inventory Of Its Contents Were Not Intrusions For Fourth Amendment Purposes	8
C. No Privacy Expectation That Society Is Prepared To Recognize As Reasonable Was Breached By Such An Entry and Inventory	14
D. Excessive Social Costs Would Attend Fourth Amendment Application To Government's Entry And Inventory Of Its Employee's Office For Work-Related Purposes	20
E. Assuming, Arguendo, Such An Entry And Inventory Is Subject To Fourth Amendment Protection, The Action Of Petitioners Was Reasonable Under An Appropriate Balancing Test	22
CONCLUSION	26
APPENDIX	A-1

TABLE OF CITATIONS

CASES	PAGE
Allen v. City of Marietta, 601 F.Supp. 482 (N.D. Ga. 1985)	19
Arnett v. Kennedy, 416 U.S. 134 (1974)	10
Baker v. McCollan, 443 U.S. 137 (1979)	5, 7, 8
Bishop v. Wood, 426 U.S. 341 (1976)	6, 14, 22, 25, 26
Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971)	11
Bush v. Lucas, 462 U.S. 367 (1983)	5, 6, 11, 12, 20, 21
Butz v. Economou, 438 U.S. 478 (1978)	20, 21
Camara v. Municipal Court, 387 U.S. 523 (1967)	9, 22, 23, 24
Carey v. Piphus, 435 U.S. 247 (1978)	7
Chenkin v. Bellevue Hosp. Ctr., N.Y.C., Etc., 479 F.Supp. 207 (S.D. N.Y. 1979)	4, 19
Chocallo v. Bureau of Hearings and Appeals, SSA, 548 F.Supp. 1349 (E.D. Pa. 1982)	19
Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970)	14
Connick v. Myers, 461 U.S. 138 (1983)	5, 9, 10, 12, 20, 21
Davis v. Scherer, 468 U.S. 183, 82 L.ED.2d 139, 104 S.Ct. 3012 (1984)	14, 26
Ex parte Curtis, 106 U.S. 371 (1882)	10
Gillard v. Schmidt, 579 F.2d 825 (CA3 1978)	18
Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979)	10
Harlow v. Fitzgerald, 457 U.S. 800 (1982)	20
Hudson v. Palmer, 468 U.S. 517, 82 L.Ed.2d 393, 104 S.Ct. 3194 (1984)	9, 14
Imbler v. Pachtman, 424 U.S. 409 (1976)	7, 20
Jafree v. Scott, 372 F.Supp. 264 (N.D. Ill. E.D. 1974)	19
Katz v. United States, 389 U.S. (1967)	17
Mancusi v. DeForte, 392 U.S. 364 (1968)	9, 13
Marshall v. Barlow's, Inc., 436 U.S. 307 (1978)	9, 14, 24
Martinez v. California, 444 U.S. 277 (1980)	5, 8

CASES — PAGE

Michigan v. Tyler, 436 U.S. 499 (1978) 9
Mitchum v. Foster, 407 U.S. 225 (1972) 7
Monroe v. Pape, 365 U.S. 167 (1961) 7
Mt. Healthy City Board of Ed. v. Doyle, 429 U.S. 274 (1977) 10
New Jersey v. T.L.O., 469 U.S. ____, 83 L.Ed.2d 720, 105 S.Ct. 733 (1985) 9, 22, 23, 24
Oliver v. United States, 466 U.S. 170 (1984) 9, 15
Parratt v. Taylor, 451 U.S. 527 (1981) 26
Paul v. Davis, 424 U.S. 693 (1976) 8
Perry v. Sindermann, 408 U.S. 593 (1972) 10
Pickering v. Board of Education, 391 U.S. 563 (1968) 10
See v. City of Seattle, 387 U.S. 541 (1967) 9
Shaffer v. Field, 339 F.Supp. 997 (C.D. Cal. 1972), aff'd 484 F.2d 1196 (CA9 1973) 18
Terry v. Ohio, 392 U.S. 1 (1968) 23
United States v. Biswell, 406 U.S. 311 (1972) 14
United States v. Blok, 188 F.2d 1019 (CA D.C. 1951) 16
United States v. Brignoni-Ponce, 422 U.S. 873 (1975) 23
United States v. Bunkers, 521 F.2d 1217 (CA9 1975) 18
United States v. Collins, 349 F.2d 863 (CA2 1965) 17
United States v. Donato, 269 F.Supp. 921 (E.D. Pa. 1967) Aff'd. 379 F.2d 288 (CA3 1967) 18
United States v. Jacobsen, 466 U.S. 109 (1984) 15
United States v. Kahan, 350 F.Supp. 784 (S.D. N.Y. 1972) 19
United States v. Nasser, 476 F.2d 1111 (CA7 1973) 17
United States v. Speights, 557 F.2d 362 (CA3 1977) 17
Williams v. Collins, 728 F.2d 721 (CA5 1984) 19
Wyman v. James, 400 U.S. 309 (1971) 9, 12, 15
Youngberg v. Romeo, 457 U.S. 307 (1982) 21

CODES

California Government Code,
Sections 19570-88 ..... A-1 to A-9
Section 19572 24

PAGE

CONSTITUTIONS

United States Constitution Fourth Amendment 2

MISCELLANEOUS

P. Schuck, *Suing Government* (1983) 21
Title 28, U.S.C. § 1254(1) 21
Title 42, U.S.C. § 1983 21

No. 85-530

IN THE

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OCTOBER TERM, 1985

DENNIS M. O'CONNOR, et al.,
Petitioners,

vs.

MAGNO J. ORTEGA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. A-1 to A-7) is reported at 764 F.2d 703 (1985). The judgment of the United States District Court (Pet. App. A-8) is not reported.

JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit was entered on June 27, 1985. The petition for a writ of certiorari was filed on September 25, 1985. On December 9, 1985, a writ of certiorari was granted limited to the first question in the petition. U.S. , L.Ed.2d , S.Ct. .

The jurisdiction of this court is involved under Title 28, United States Code section 1254(1).

CONSTITUTIONAL PROVISIONS AND APPLICABLE FEDERAL LAWS

1. United States Constitution, Fourth Amendment:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath of affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. Title 42, United States Code Section 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

STATEMENT OF THE CASE

This case arises out of a complaint by respondent that his Fourth Amendment rights were violated under 42 U.S.C. § 1983 by hospital administrators of Napa State Hospital who entered his locked, government-owned office without a warrant to conduct an administrative inventory of his papers. On cross-motions for summary judgment, the District Court granted the petitioners' motion on all grounds raised. (Pet. App. A-8.) The Court of Appeals reversed the trial court's decision on the claim of a violation under 42 U.S.C. § 1983.[1]

Petitioners Dennis M. O'Connor, Richard Friday, Dorothy Owen, and Stefan Donoviel were all employees of the Napa State Hospital of the State of California. Dr. O'Connor was the Executive Director; Mr. Friday was the hospital administrator; Mr. Donoviel was the Clinical Director, and Ms. Owen was the personnel officer of said hospital. (J.A. 2, 18.) Respondent, Dr. Magno J. Ortega, is a licensed physician and psychiatrist who had held the position of Chief of Professional Education at Napa State Hospital from 1964 to September 22, 1981. (J.A. 13.)

On July 30, 1981 Dr. O'Connor informed Dr. Ortega that he planned to investigate the management practices of Dr. Ortega's department. (J.A. 8, 27-28.) Previously Dr. O'Connor had received complaints against Dr. Ortega. These complaints included charges that 1) medical residents had been coerced into purchasing a computer;[2] 2) Dr. Ortega had entered into improper contracts involving the computer; 3) female residents had been sexually harassed; and 4) a doctor had been improperly placed on involuntary leave by Dr. Ortega. (J.A. 30, 31, 49; Pet. App. A-10 to A-15.)

At the July 30 meeting, Dr. O'Connor stated that he intended to place Dr. Ortega on administrative leave. Dr. Ortega instead requested that he be permitted to take two

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[1] Several other issues decided in the District Court in petitioners' favor are not involved here. Respondent appealed only two matters to the Court of Appeals: 1) the Fourth Amendment issue; and 2) whether or not respondent's pendent state claims were barred for failure to comply with the California Torts Claims Act. The Court of Appeals affirmed the trial court's decision on the pendent state claims issue. Respondent did not appeal the tort claims issue. (Pet. App. A-1 to A-7.)

[2] In August of 1981, Dr. O'Connor and Mr. Friday believed the computer was hospital property donated to the institution by a computer distributor. (J.A. 30, 35, 49-50.)

weeks vacation commencing on Friday, July 31, 1981. Dr. O'Connor confirmed the request in a memo which further directed Dr. Ortega to remain off hospital grounds unless he had Dr. O'Connor's written approval to return. (J.A. 8.) On Friday, August 14, 1981, Dr. O'Connor ordered Dr. Ortega by letter to go on administrative leave with pay because the investigation was incomplete. (J.A. 9.)

Shortly after the July 30, 1981 meeting with Dr. Ortega, Dr. O'Connor selected three hospital personnel to investigate the charges against Dr. Ortega. They included an accountant (Mr. Arnold), a physician (Dr. Laskay), and a hospital peace officer attached to security service (Mr. Stratton). (J.A. 34, 48, 62-63.) Mr. Friday directed the investigative team. As part of the investigation he authorized entry into the office to have state property identified and secured, including residents' files. (J.A. 50-51, 58-59.) Further justification for the entry was based on a report to Dr. O'Connor that Dr. Ortega had returned to hospital grounds and removed the computer in question from the hospital to his home during the weekend of August 15th and 16th.[3] Dr. O'Connor was concerned that a theft of state property may have occurred. (J.A. 35-36.)

Sometime after the weekend the computer was removed, and in the continuing course of the investigation, Dr. Ortega's office door was unlocked, his office entered, and its contents inventoried.[4]

On April 10, 1984, cross-motions for summary judgment were made in the District Court by petitioners and respondent. The District Court granted petitioners' motion for summary judgment on all issues raised, and denied respondent's motion in its entirety. The District Court found the administrative search reasonable citing the three-prong test raised in *Chenkin* v. *Bellevue Hosp. Ctr. N.Y.C., Etc.*, 479 F.Supp. 207 (S.D. N.Y. 1979). It found there was a public necessity to secure the office, particularly when the computer had been removed. It found the search efficacious since state property was secured and the contents of the office were removed so that the office could be

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[3] The Court of Appeals implies that Dr. O'Connor was aware that Dr. Ortega removed the computer to his home on weekends. This is in direct conflict with testimony of petitioners O'Connor and Friday. Each denied such knowledge until mid-August 1981. (J.A. 18-19, 35-36.)

[4] See footnote 5 for a description of the inventory.

used by another employee. It also found the degree of intrusion in the seizure of the personal effects was minimized by the fact that plaintiff could have secured his effects but chose not to do so. (J.A. 22-25.)

The Court of Appeals reversed the decision of the trial court and found that Dr. Ortega had a reasonable expectation of privacy in his office which society was prepared to accept and protect as reasonable. (764 F.2d 703 at p. 705.) The Court of Appeals held that Dr. Ortega had a great expectation of privacy in his office since his name was on the door, the office was kept locked, and he believed he had the only key. The office was also likely to contain sensitive and confidential information about Ortega's patients as well as personnel files. (*Id.*, at 706.) The court further found that Napa had never instituted a general inspection policy which might have defeated Dr. Ortega's expectation of privacy. (*Id.*, at 706-707.) The Court of Appeals reversed the decision for the petitioners, granted judgment to respondent, and remanded to the trial court only on the issue of damages. (*Id.*, at 707.)

SUMMARY OF ARGUMENT

Respondent has failed to identify a constitutional right cognizable under 42 U.S.C. § 1983 in bringing this action against petitioners, officials and administrators of Napa State Hospital as a result of their authorization for the entry and inventory of respondent's office in the course of an administrative investigation into the latter's work-related conduct. Identification of such a right is a necessary first step in any § 1983 action. (*Baker* v. *McCollan*, 443 U.S. 137, 140 (1979); *Martinez* v. *California* 444 U.S. 277, 284 (1980).)

Petitioners submit neither entry into nor inventory of respondent's office in the course of their supervision and investigation of respondent was conduct within the contemplation of Fourth Amendment protection. Although the scope of the Fourth Amendment extends to one's office, the "practical realities involved in the administration of a government office" (*Connick* v. *Myers*, 461 U.S. 138, 154 (1983)) as well as considerations of social costs (*Bush* v. *Lucas*, 462 U.S.

367 (1983); *Bishop* v. *Wood*, 426 U.S. 341 (1976)) foreclose Fourth Amendment applicability to government's entry and inventory of its employee's office for supervision or administrative investigation purposes.

Moreover, a public employee can lay no claim to a legitimate expectation of privacy in the office in such a context which society would accept as reasonable. Federal decisional law is virtually unanimous in its recognition that such governmental action is necessary and reasonable and intrudes upon no reasonable expectation of employee privacy.

Assuming, arguendo, the entry and inventory of respondent's office was subject to Fourth Amendment protection, the action of petitioners was reasonable and did not constitute an unreasonable search. Significant governmental needs of efficient operation through effective supervision, employee discipline, and preservation of informality in the employment relationship, when balanced against a minimal privacy interest of the employee, justify only a greatly reduced standard of Fourth Amendment protection. Warrant, probable cause, and reasonable suspicion standards which apply in the contexts of the traditional criminal search or the business/premises inspection are not relevant here. Instead, such governmental action is reasonable when based upon concern for an employee's work-related activity. Finally, petitioners submit the entry and inventory of respondent's office was reasonable and not actionable under § 1983.

ARGUMENT

NEITHER ENTRY INTO RESPONDENT'S GOVERNMENT OFFICE NOR INVENTORY OF ITS CONTENTS IN THE COURSE OF PETITIONERS' ADMINISTRATIVE INVESTIGATION INTO RESPONDENT'S EMPLOYMENT ACTIVITY VIOLATED RESPONDENT'S CIVIL RIGHTS UNDER 42 U.S.C. SECTION 1983

A. At The Threshold, Respondent Has Not Identified A Constitutional Or Other Right Cognizable Under 42 U.S.C. Section 1983

The legislative history of § 1983 demonstrates that it was intended to "[create] a species of tort liability" in favor of persons who are deprived of "rights, privileges or immunities secured" to them by the Constitution. (*Carey* v. *Piphus,* 435 U.S. 247, 253 (1978); *Imbler* v. *Pachtman,* 424 U.S. 409, 417 (1976); *Mitchum* v. *Foster,* 407 U.S. 225, 238-242 (1972); *Monroe* v. *Pape,* 365 U.S. 167, 172-183 (1961).)

The Court, in *Baker* v. *McCollan,* 443 U.S. 137, 140 (1979), reiterated the fundamental principle concerning *any* 42 U.S.C. § 1983 action that before liability under the statute

> ". . . can be meaningfully explored, it is necessary to isolate the precise constitutional violation . . . charged. For § 1983 imposes civil liability only upon one
>
> > 'who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities *secured by the Constitution and laws.* . . .' (42 U.S.C., § 1983.)
>
> The first inquiry in any § 1983 suit, therefore, is whether the plaintiff has been deprived of a right 'secured by the Constitution and laws.'" [Original emphasis.]

The Court hastened to observe that identification of a constitutional right allegedly infringed in a particular case is a necessary and initial step in a § 1983 suit. (*Martinez* v. *California,* 444 U.S. 277, 284 (1980); *Baker* v. *McCollan, supra,* 443 U.S. 137, 140 (1979); *Paul* v. *Davis,* 424 U.S. 693, 700-701 (1976).) The following analysis of this necessary first step process demonstrates respondent has not established a viable claim under § 1983, because he has failed to identify a right subject to Fourth Amendment protection which was infringed when officials of the government agency employing him authorized and conducted the entry and inventory[5] of his assigned government office in the course of its administrative investigation into respondent's management practices and other work-related conduct.

B. The Entry Of Respondent's Office And Inventory Of Its Contents Were Not Intrusions For Fourth Amendment Purposes

Petitioners, at the threshold of their Fourth Amendment analysis, tender for the Court's consideration the specific question of whether the Fourth Amendment applies to a government's administrative inventory of the contents of an office assigned to its employee in the course of the agency's administrative investigation into the employee's work-related conduct.

In making their initial submission that the Fourth Amendment does not apply in such a context, petitioners are mindful that the Court has applied Fourth Amendment guarantees

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[5] Various terminology has been used in this case to characterize the contact made with the contents of respondent's office. In the Petition for Writ of Certiorari, petitioners, in presenting the question, described the activity as an "inventory of papers." The opinion of the Court of Appeals states "investigating officials attempted to sort through the items . . . took some for use in the ongoing investigation . . . and . . . removed the items from the office for storage in a special locked area, where they were available for [respondent] to pick them up." (764 F.2d at p. 704; see also Appendix to Petition for Writ of Certiorari.) Both petitioner O'Connor, the Executive Director of Napa State Hospital, who authorized the investigation (J.A. 37.) and petitioner Friday, Business Manager of the hospital, who oversaw the investigation (J.A. 48-50.) testified their purpose was to identify and separate state property from personal, and to maintain access to government records. The official assigned to the task described the attempted separation as impossible and boxed the materials. (J.A. 61-63.) For purposes of consistency and simplicity, petitioners continue to refer to the activity as an "inventory."

beyond the "paradigmatic entry" into a home by police officers in search of evidence for the prosecution of crime. (*Michigan* v. *Tyler,* 436 U.S. 499, 504 (1978).) Protection of the Fourth Amendment extends to an office,[6] as well as business premises when searched or inspected to insure compliance with fire, health, and safety statutes and regulations.[7] As recognized in *Oliver* v. *United States,* 466 U.S. 170, 178, fn. 8, (1984), such protection is based upon "societal expectations that have deep roots in the history of the Amendment."

Furthermore, petitioners recognize the relevant corollary that Fourth Amendment strictures apply to state officials, whether criminal or civil, in safeguarding reasonable privacy interests against arbitrary governmental invasion. (*New Jersey* v. *T.L.O.,* 469 U.S. , 83 L.Ed.2d 720, 730, 105 S.Ct. 733 (1985).)

The Court, however, has addressed the intitial question of Fourth Amendment applicability in varying contexts,[8] and the issue is ripe for determination here.

The "practical realities involved in the administration of a government office" (*Connick* v. *Myers,* 461 U.S. 138, 154

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[6] In *Mancusi* v. *DeForte,* 392 U.S. 364 (1968), a warrantless search by criminal authorities of a union official's office for business records during the pendency of indictment proceedings was held to be in violation of the Fourth Amendment.

[7] *Marshall* v. *Barlow's, Inc.,* 436 U.S. 307, 312-313 (1978) (holding a warrant is required for OSHA inspections); *Camara* v. *Municipal Court,* 387 U.S. 523, 528 (1967) (an inspection for housing code violation requires a warrant issued upon a standard less stringent than probable cause); *See* v. *City of Seattle,* 387 U.S. 541 (1967) applying the rationale of *Camara* to a safety inspection of business premises.

[8] See, e.g., *New Jersey* v. *T.L.O., supra,* 83 L.Ed.2d 720, 729 (1985) (holding Fourth Amendment applies to a public school official's search of a student's handbag); *Hudson* v. *Palmer,* 468 U.S. 517, 82 L.Ed.2d 393, 402-403, 104 S.Ct. 3194 (1984) (holding Fourth Amendment protection does not apply "within t. confines of the prison cell"); *Wyman* v. *James,* 400 U.S. 309, 316-318 (1971) (implying a social worker's home visitation to verify conditions justifying financial assistance under New York's AFDC program is not a traditional search within the contemplation of the Fourth Amendment). See also *Oliver* v. *United States,* 466 U.S. 170, 176-177 (1984) (reaffirming Fourth Amendment protection does not apply to "open fields").

(1983))[9] must be considered at this threshold juncture against a public employee's claim of violation of civil rights. Although a public employee does not relinquish consitutional rights by virtue of public employment (*Pickering* v. *Board of Education,* 391 U.S. 563 (1968)), the Court has carefully noted that in all of *Pickering's* progeny there is reflected "both the historical evolvement of the rights of public employees, and the common-sense realization that government offices could not function if every employment decision becomes a constitutional matter."[10]

Over one hundred years ago, the Court recognized government's proper purpose in "promot[ing] efficiency and integrity in the discharge of official duties, and to maintain proper discipline in the public service" *Ex parte Curtis,* 106 U.S. 371, 373 (1882), a purpose which Justice Powell noted in his separate opinion in *Arnett* v. *Kennedy,* 416 U.S. 134, 168 (1974):

> "To this end, the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency."

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[9] Although the Court in *Connick* engaged in a balancing of interests between First Amendment freedoms and a government employer's need to provide efficient public services, the majority opinion recognized there was "much force" to the position that a deputy district attorney's distribution of her questionnaire soliciting views on office morale and other problems following a change in her duty assignment was "wholly without First Amendment protection." (*Id.,* at p. 143.)

[10] *Connick* v. *Myers, supra,* 461 U.S. 138, 143 (1983). See also *Perry* v. *Sindermann,* 408 U.S. 593, 598 (1972); *Mt. Healthy City Board of Ed.* v. *Doyle,* 429 U.S. 274, 284 (1977); *Givhan* v. *Western Line Consolidated School District,* 439 U.S. 410, 414 (1979).

The case of *Bush* v. *Lucas*, 462 U.S. 367 (1983) dealt with the related context of a federal employee suing the federal government directly under the First Amendment[11] for a retaliatory demotion occasioned by the employee's public criticism of his agency. In refusing to create a new judicial damage remedy, the opinion of Justice Stevens for a unanimous Court identified significant policy considerations which apply with much force to the instant action:

> "Given the history of the development of civil service remedies and the comprehensive nature of the remedies currently available, it is clear that the question we confront today is quite different from the typical remedial issue confronted by a common-law court. The question is not what remedy the court should provide for a wrong that would otherwise go unredressed. It is whether an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy for the constitutional violation at issue. That question obviously cannot be answered simply by noting that existing remedies do not provide complete relief for the plaintiff. The policy judgment should be informed by a thorough understanding of the existing regulatory structure and the respective costs and benefits that would result from the addition of another remedy for violations of employees' First Amendment rights.
>
> The costs associated with the review of disciplinary decisions are already significant—not only in monetary terms, but also in the time and energy of managerial personnel who must defend their decisions. Respondent argues that supervisory personnel are already more hesitant than they should be in administering discipline, because the review that ensues inevitably makes the performance of their regular duties more difficult. Brief for Respondent 37-41. Whether or not this assessment is accu-

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[11] The Court noted, 462 U.S. at 374-375, the action as akin to one brought under *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), which is, of course, the federal analogue of a § 1983 action. The Court assumed, without deciding, a First Amendment violation. (*Id.*, at p. 372.)

> rate, it is quite probable that if management personnel face the added risk of personal liability for decisions that they believe to be a correct response to improper criticism of the agency, they would be deterred from imposing discipline in future cases. In all events, Congress is in a far better position than a court to evaluate the impact of a new species of litigation between federal employees on the efficiency of the civil service. Not only has Congress developed considerable familiarity with balancing governmental efficiency and the rights of employees, but it also may inform itself through factfinding procedures such as hearings that are not available to the courts."[12]

The relevance of *Bush* to this case is the Court's recognition of the significant social costs[13] that would attend a public employee's option to convert a work-related dispute or grievance into a constitutional tort. Such social costs are unacceptable, as they ultimately prevent government from fulfilling its public trust.

Any analysis of social costs must be placed in context. (*Connick* v. *Myers, supra,* 461 U.S. 138, 153-154 (1983).) In this case, we are concerned with government's duties to oversee its employees, insure its mandated service is performed, and investigate possible misconduct relevant to the employee's performance of his duties. Specifically, we deal with government's entry into its employee's office and inventory of office contents in the course of an administrative investigation into concerns of work-related wrongdoing. An entry into and inventory of an employee's government-assigned office for such a purpose do not constitute a "search in the traditional criminal law context." (See *Wyman* v. *James, supra,* 400 U.S. 309, 317 (1971).) In *Wyman,* the Court reasoned that a social worker's home visitation for the purpose of monitoring health and decency conditions and verifying justification for public finan-

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[12] *Id.,* at pages 388-389. Petitioners realize that the result in *Bush* was substantially based upon the existence of comprehensive legislation of Congress regulating civil service employment, a factor "counselling hesitation" in the creation of a new judicial remedy. California also has enacted such a scheme. (See Cal. Gov. Code, §§ 19570-88, set forth in attached Appendix.)

[13] The issue of social costs is discussed in greater detail in Part D, *infra.*

cial assistance was not a search "in the Fourth Amendment meaning of that term." (*Ibid.*) It would defy reason and logic to hold that although government's visitation of a welfare recipient's home does not implicate Fourth Amendment protection, administrators of the social agency providing the benefit may not enter and inspect its employee's office to investigate or monitor performance without Fourth Amendment compliance. Yet, both respondent's position and the reasoning of the opinion of the Court of Appeals in this case call for such a result.

Office entry and inventory by administrators of a government agency for the purpose of supervising its employee and/or investigating work-related conduct is not a criminal investigation and should not be equated with one. Where the government employer does not act in aid of a pending criminal proceeding, it must have the same right to oversee its employees and investigate job performance as any private employer would have. If government's access to its own records and offices for the efficient conduct of its business is predicated upon Fourth Amendment pre-justification standards, provision of public services will truly suffer. Even *Mancusi* v. *DeForte, supra,* 392 U.S. 364, 369 (1968), in applying Fourth Amendment protection to a union official's shared office, in the context of a search of business records by criminal authorities during grand jury proceedings, recognized the reasonable assumption that such records were subject to the dominion of DeForte's "union superiors," or "union higher-ups."

In the context of supervision and administration, a government agency's access to the offices of its employees, and the contents of those offices, cannot be conditioned upon prior compliance with standards of Fourth Amendment protection. In this regard, there is a parity of reasoning between government's need to function through effective supervision of its employees and the rationale expressed in the business inspection cases that hold voluntary entry into an industry "closely regulated" by government removes reasonable ex-

pectations of privacy related to the object of regulation. (*United States* v. *Biswell,* 406 U.S. 311 (1972); *Colonnade Catering Corp.* v. *United States,* 397 U.S. 72 (1970).)[14]

Government offices and their contents play a foreseeable and integral part in government's very essence, i.e., service to the public, and it is unreasonable for a government employee to claim Fourth Amendment thresholds must be successfully negotiated by administrative officials before they may gain access to these places for supervisory purposes. Justice Powell, in writing for the Court in *Davis* v. *Scherer,* 468 U.S. 183, 82 L.Ed.2d 139, 150, 104 S.Ct. 3012 (1984), wisely rejected a government employee's § 1983 claim where it, ". . . if adopted, would disrupt the balance that our cases strike between the interests in vindications of citizens' constitutional rights and in public officials' effective performance of their duties." As Justice Stevens cogently observed for the Court in *Bishop* v. *Wood,* 426 U.S. 341, 349 (1976), denying a § 1983 claim brought by a government employee:

> "The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies."

Petitioners respectfully submit that the Fourth Amendment does not apply to an entry into and inventory of a public employee's government-assigned office by agency administrators in the context of supervision or administrative investigation into work-related conduct.

C. No Privacy Expectation That Society Is Prepared To Recognize As Reasonable Was Breached By Such An Entry And Inventory

In the course of a determination of whether Fourth Amendment protection applies in a given context, or following such a determination, the Court has further considered whether a claimed intrusion breached a legitimate expectation of privacy. (*Hudson* v. *Palmer, supra,* 468 U.S. 517, 82 L.Ed.2d 393,

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[14] See *Marshall* v. *Barlow's, Inc.,* 436 U.S. 307, 313 (1978) for the Court's interpretation of *Biswell* and *Colonnade.* Indeed, government's needs in this case are even stronger than in the business inspection context.

400-404, 104 S.Ct 3194 (1984); *Wyman* v. *James, supra,* 400 U.S. 309, 318-326 (1971).) (See also *Oliver* v. *United States, supra,* 466 U.S. 170, 177 (1984).)

The Court stated in *Oliver:*

> "Since *Katz* v. *United States,* 389 U.S. 347, 19 L.Ed.2d 576, 88 S.Ct. 507 (1967), the touchstone of [Fourth] Amendment analysis has been the question whether a person has a 'constitutionally protected reasonable expectation of privacy.' 389 U.S., at 360, 19 L.Ed.2d 576, 88 S.Ct. 507 (Harlan, J., concurring). The Amendment does not protect the merely subjective expectation of privacy, but only 'those expectations that society is prepared to recognize as "reasonable" ' *Id.* at 361, 19 L.Ed.2d 576, 88 S.Ct. 507. See also, *Smith* v. *Maryland,* 442 U.S. 735, 740-741, 61 L.Ed.2d 220, 99 S.Ct. 2577 (1979)." (*Oliver* v. *United States, supra,* 466 U.S. at 170, 177 (1984).) [Original emphasis.]

The Court in *United States* v. *Jacobsen,* 466 U.S. 109, 122 (1984) explained the critical difference between subjective expection of privacy and a reasonable privacy interest:

> "The concept of an interest in privacy that society is prepared to recognize as reasonable is, by its very nature, critically different from the mere expectation, however well justified, that certain facts will not come to the attention of the authorities."

The Court in *Oliver* further stressed that a privacy interest must be "ligitimate":

> "The test of legitimacy is not whether the individual chooses to conceal assertedly 'private' activity. Rather, the correct inquiry is whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment." (*Oliver* v. *United States, supra,* 466 U.S. 170, 182-183 (1984) [fn. omitted].)

A public employee's right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with the need of agency officials and supervisors to have access to the offices of public employees, and their contents, to monitor performance, administratively investigate work-related conduct, or merely to retrieve government records. Government's need in this regard is obvious, reasonable, and indispensible to its efficiency. Further, such procedures and purposes are as reasonably foreseeable to a public employee as the common practice of a fellow employee's entry of an office to obtain a file or piece of correspondence, or borrow a paper clip. Such practical realities of office life render a privacy interest of the type respondent asserts unrealistic and unreasonable from a societal point of view. Society has no interest in government offices, desks, and file cabinets becoming citadels of inefficiency. Imposition of Fourth Amendment strictures in this context would unduly disrupt the critical governmental functions noted above and serve no legitimate expectation of employee privacy. Accordingly, the balance must be struck in favor of government's need to efficiently conduct its business.

At this juncture, it would be appropriate to review the federal circuit and district court opinions generally concerning the Fourth Amendment's application to a search of a public employee's office. The cases are not uniform in either factual context or search purpose, but all appear to recognize, in a balancing context, government's right as an employer to search its employee's office in the course of supervision or to investigate possible employee work-related misconduct.

In the initial case of *United States* v. *Blok*, 188 F.2d 1019 (CA D.C. 1951), police, without a warrant but with supervisor consent, searched a desk assigned to a government public employee's exclusive use in connection with a larceny investigation. It was held the search violated the Fourth Amendment, but the Court of Appeals observed in a consistently followed caveat:

> "No doubt a search of [the desk] without her consent would have been reasonable if made by some people in some circumstances. *Her official superiors might reasonably have searched the desk for official property needed for*

> *official use.* But as the Municipal Court of Appeals said, *the search that was made was not 'an inspection or search by her superiors.* It was precisely the kind of search by policemen for evidence of crime against which the constitutional prohibition was directed.' " (*United States* v. *Blok, supra,* 188 F.2d 1019, at 1021.) (Emphasis added.)

In *United States* v. *Collins,* 349 F.2d 863 (CA2 1965), criminal authorities investigating jewel theft searched the jacket of a custom official in a government office and extracted evidence used for a criminal conviction. The Court of Appeals, in citing the above and oft-quoted language of *Blok* concluded:

> "We hold, then, that, in the circumstances of this case, the search by government agents who were investigating the theft of property connected with the defendant's employment, of defendant's work jacket hanging in a public area in the Government office where he was employed, was reasonable within the intendment of the Fourth Amendment and, therefore, not unconstitutional." (*United* v. *Collins,* 349 F.2d 863, 868 (CA2 1965).)

Collins, while relying on *Blok's* reasoning, rendered a different result as the theft of jewels was connected with employment. The result of *Collins,* predating *Katz* v. *United States,* 389 U.S. 347 (1967), is of no force, but its adherence in principle to the *Blok* caveat is appropriate.

United States v. *Nasser,* 476 F.2d 1111 (CA7 1973) concerned criminal prosecution of an IRS attorney for conflict of interest. Evidence produced by electronic surveillance during the period of employment, and before *Katz,* was held not to be in violation of the Fourth Amendment on the rationale that a warrantless police search of the work area for evidence of work-related crime was not unreasonable. (*United States* v. *Nasser, supra,* at 1123.)

United States v. *Speights,* 557 F.2d 362 (CA3 1977) involved a criminal investigation into a police officer's possession of an illegal weapon. The defendant's police locker was

searched in the process. The Court of Appeals, struggling to distinguish no less than three[15] other "locker" cases upholding searches, pointed to special circumstances indicating agency acquiescense to a subjective expectation of privacy and ruled the search illegal. The criminal nature of the investigation in *Speights* distinguishes that case from the case at bar.

Gillard v. *Schmidt*, 579 F.2d 825 (CA3 1978) heavily relied upon by both the Court of Appeals[16] in this case and respondent, is in fact contrary to respondent's cause. Indeed, it is consistent with the general principle of *Blok, Collins,* and *Nasser* that a public employer may search an employee's office when the search is "work-related." In *Gillard,* a Board of Education member was offended by his depiction in a published political cartoon drawn by a public school counselor. The board member searched the counselor's desk to verify his involvement. While recognizing the counselor's expectation of privacy was breached and a 1983 claim was stated, the Court of Appeals expressly implied the search would have been proper if "work-related" and not merely the product of personal animus of a nonemployer:

> "Because the record contains no evidence that Schmidt was acting to recover government property, or was undertaking as an employer to monitor Gillard's

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[15] *United States* v. *Bunkers*, 521 F.2d 1217 (CA9 1975), cert. den., 423 U.S. 989 upheld a warrantless criminal search for stolen C.O.D. parcels of a postal employee's locker. *Shaffer* v. *Field*, 339 F.Supp. 997 (C.D. Cal. 1972), aff'd. 484 F.2d 1196 (CA9 1973), upheld a warrantless criminal search of the locker of a deputy sheriff. *United States* v. *Donato*, 269 F.Supp. 921 (E.D. Pa. 1967) aff'd. 379 F.2d 288 (CA3 1967), upheld a warrantless search of a U.S. Mint employee's locker. The *Speights* court reasoned the results were correct in *Bunkers, Shaffer,* and *Donato,* because each involved either a regulation or practice of such a search thereby providing notice. Notwithstanding *Speights* apparent willingness to accept the risk of government by proclamation, it is clear that *Speights* must be distinguished from this case as the foreseeable and necessary practice of government supervision of its employees provides the "notice" that *Speights* would require.

[16] The opinion of the Court of Appeals in this case fails to analyze the critical issue of whether respondent's subjective expectation of privacy was one which society would recognize as reasonable. Both the Ninth Circuit and respondent place mistaken reliance upon subjective privacy factors (respondent's seventeen year assignment to one office, respondent's faulty assumption he possessed the only key to his office, and respondent's utilization of government office space for storage of private practice patent records) in determining the question of whether his privacy expection was reasonable by society's standards. *Gillard* presents a similar defect in analysis.

> performance of his official duties, we have no occasion to determine the force of precedents which indicate that a public employer may invade an employee's privacy when the invasion is 'work-related.' *E.g., United States* v. *Nasser,* 476 F.2d 1111, 1123 (7th Cir. 1973) (IRS's search of employee's office to determine employee's proper work performance upheld); see *United States* v. *Hagarty,* 388 F.2d 713 (7th Cir. 1968) (search of government employee's office to secure criminal evidence violated fourth amendment.)" (*Gillard* v. *Schmidt, supra,* 579 F.2d at 829, fn. 1.)

The latest relevant circuit opinion rejects a federal employee's common-law action against his supervisors stemming from their search and inventory of his desk. (*Williams* v. *Collins,* 728 F.2d 721 (CA5 1984).) At 728 F.2d 728, the Court of Appeals notes:

> "It is by no means certain that Williams had a reasonable expectation of privacy in his government-furnished desk, in relation to the possibility of his supervisors entering the desk as part of an investigation of Williams' job performance or as part of an office inventory." [Citations omitted.]

The federal district court opinions concerning this issue overwhelmingly support the entry and inventory in this case.[17]

When the pertinent opinions of all the circuit courts of appeals and district courts are parsed, perhaps the most compelling analysis is found in *Allen* v. *City of Marietta,* 601 F.Supp. 482, 491 (N.D. Ga. 1985), to which petitioners fully subscribe:

> "This court believes that the theme underlying all of the cases discussing searches of government employees can be summarized as follows. Government employees do not surrender their fourth amendment rights merely because they go to work for the government. They have as much of

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[17] *Allen* v. *City of Marietta,* 601 F.Supp. 482, 490-491 (N.D. Ga. 1985); *Chocallo* v. *Bureau of Hearings and Appeals, SSA,* 548 F.Supp. 1349, 1364 (E.D. Pa 1982); *Chenkin* v. *Bellevue Hosp. Ctr., N.Y.C., Etc.,* 479 F.Supp. 207, 213-215 (S.D. N.Y. 1979); *Jafree* v. *Scott,* 372 F.Supp. 264, 273-274 (N.D. ILL., E.D. 1974); *United States* v. *Kahan,* 350 F.Supp. 784, 791 (S.D. N.Y. 1972).

> a right to be free from warrantless government searches as any other citizens. At the same time, however, the government has the same right as any private employer to oversee its employees and investigate potential misconduct relevant to the employee's performance of his duties. Thus, a government employee's superiors might legitimately search her desk or her locker or her jacket where the purpose of the search is not to gather evidence of a crime unrelated to the employee's performance of her duties but is rather undertaken for the proprietary purpose of preventing future damage to the agency's ability to discharge effectively its statutory responsibilities. Because the government as employer has the same rights to discover and prevent employee misconduct relevant to the employee's performance of her duties, the employee cannot really claim a legitimate expectation of privacy from searches of that nature."

In sum, petitioners submit their conduct violated no privacy expectation of respondent that society would accept as reasonable.

D. Excessive Social Costs Would Attend Fourth Amendment Application To Government's Entry And Inventory Of Its Employee's Office For Work-Related Purposes

As petitioners have recognized, Part B, *supra,* the Court has expressed concern over the significant social costs that would result from the conversion of a public employee's work-related dispute into a constitutional or other federal tort. (*Bush* v. *Lucas,* 462 U.S. 367 (1983); *Connick* v. *Meyers,* 461 U.S. 138 (1983).) Certainly, potential proliferation of § 1983 and *Bivens* litigation by disgruntled persons subject to the administrative process has concerned the Court. (*Butz* v. *Economou,* 438 U.S. 478, 515 (1978).) Immunity principles have been fashioned so as to prevent such a prospect and permit government officials to perform their jobs. (*Harlow* v. *Fitzgerald,* 457 U.S. 800, 816-817 (1982); *Imbler* v. *Pachtman,* 424 U.S. 409, 426-428 (1976).)

Just as the role of the prosecutor is likely to produce "with some frequency retaliatory suits by angry defendants," *Butz, supra,* 438 U.S. at 510, so the obstinate or vengeful public employee may easily convert an office inventory or inspection for records into an ascription of supervisorial malice and constitutional wrongdoing.

In the absence of a threshold barrier to such lawsuits, government officials will become ensnared in frivolous and time-consuming actions. Professor P. Schuck, who has exhaustively written on the subject of social costs attending suits against public servants, notes the probable responses of all officials to the threat of litigation as inaction, formalism, and changes in the character of decisions. (P. Schuck, *Suing Government* (1983) at pp. 59-81.)

Recognition of this action as viable under § 1983 would create intolerable burdens in the administration of a government office. Supervision would become a formalized product of Fourth Amendment prejustification standards. Agency inefficiency due to administrative paralysis would ultimately impair provision of government services. A § 1983 action could be triggered by an intended beneficiary suffering such denial or impairment of the service. Officials such as petitioners herein[18] would be placed on the horns of a sinister civil rights dilemma. Inadequate supervision or administration might lead to personal liability on the part of the official in favor of the intended beneficiary denied the needed service, whereas a proper level of public employee supervision by the same official might produce claims such as respondent's herein. Such a prospect must be avoided.

As the Court has noted in the past, such "practical realities involved in the administration of a government office" must be considered against a public employee's § 1983 claim. (*Connick* v. *Myers, supra,* 461 U.S. 138, 154 (1983); see also, *Bush* v. *Lucas, supra,* 462 U.S. 367 (1983).) Simply put, § 1983 is not the appropriate vehicle to review "the multitude of personnel

[18] See *Youngberg* v. *Romeo,* 457 U.S. 307 (1982), recognizing constitutional rights of developmentally disabled persons in state institutions to reasonable conditions of confinement and care.

decisions that are made daily by public agencies." (*Bishop* v. *Wood, supra,* 426 U.S. 341, 349 (1976).) The social costs of recognizing respondent's claim as viable under § 1983 are too great for society to bear.

Petitioners respectfully submit that based upon sound considerations of Fourth Amendment tradition and principles, as well as a considered inquiry into the excessive social costs that would attend extension of Fourth Amendment protection to government's entry and inventory of its employee's office for administrative purposes, respondent has failed to state a claim cognizable under the Federal Civil Rights Act (42 U.S.C., § 1983).

E. Assuming, Arguendo, Such An Entry And Inventory Was Subject To Fourth Amendment Protection, The Action Of Petitioners Was Reasonable Under An Appropriate Balancing Test

Assuming, arguendo, the entry and inventory of respondent's office was the type of intrusion which would invoke some level of Fourth Amendment protection on the rationale that an employee, whether in the public or private sector, brings personal items to the work place, such action was reasonable when viewed in "context" and "balancing the need to search against the invasion which the search entail[ed]." (*Camara* v. *Municipal Court, supra,* 387 U.S. 523, 536-537 (1967); see also *New Jersey* v. *T.L.O., supra,* 469 U.S. , 83 L.Ed.2d 720, 731-735, 105 S.Ct. 733 (1985).)

In *New Jersey* v. *T.L.O.,* the Court, in upholding a school official's search of a student's purse, balanced the reasonable privacy interests of a public school student against the needs of school teachers and administrators to (1) maintain school discipline and (2) preserve informality of the student-teacher relationship. Similarly, the needs of government to (1) operate efficiently and effectively through proper supervision and administration of its employees, (2) maintain discipline in the workplace, and (3) preserve the informality of the employer-employee relationship, dictate the reasonableness of an entry and inventory of a public employee's office by the employee's supervisors for work-related purposes.

Government's needs in this type of case are even greater than the needs recognized in *New Jersey* v. *T.L.O.*, for it is both foreseeable and reasonable that government have access to its employee's desks and file cabinets for the very purpose of conducting its business. Files, correspondence and other work-related materials are contained therein and must be retrieved, reviewed, or simply reassigned. School officials, although undeniably having an interest in securing weapons or contraband from a student's purse, do not rely upon access to the contents of such a container to conduct government business.

Furthermore, the need of government to maintain access to the offices of its employees for work-related purposes is reasonably foreseeable to every public employee. The employee's option of not bringing to the workplace contraband or highly personal items is much more reasonable than imposing strict Fourth Amendment standards upon governmental access to its employees' offices.

The question then becomes how should we strike the balance between any legitimate expectation of a public employee's privacy and the government employer's legitimate needs noted above. (See *New Jersey* v. *T.L.O., supra,* 469 U.S. at , 83 L.Ed.2d at 733, 105 S.Ct. 733 (1985).) In the words of the Court in *New Jersey* v. *T.L.O.*, " [t]he warrant requirement, in particular, is unsuited . . ." to the context of a governmental inventory of an office for work-related purposes. (*Id.*) Such a requirement would "unduly interfere" with government's ability to function. (*Id.*) Moreover, the warrant process would "frustrate the governmental purpose behind the search." (See *Camara* v. *Municipal Court, supra,* at 387 U.S. 532-533 (1967).)

The context of governmental supervision of its employees for work-related purposes renders the "probable cause" requirement and its accepted reducible levels[19] irrelevant to an

[19] Such as "reasonable suspicion" (e.g., *Terry* v. *Ohio,* 392 U.S. 1 (1968); *United States* v. *Brignoni-Ponce,* 422 U.S. 873 (1975).

inventory of a public employee's office, because government's purpose is neither to detect crime (or its evidence) nor to enforce business inspection or regulation statutes.[20]

Rather, petitioners submit legality of such an intrusion should be based simply upon its reasonableness in light of all surrounding circumstances. (*New Jersey* v. *T.L.O., supra,* 469 U.S. at , 83 L.Ed.2d at 734, 105 S.Ct. 733 (1985).) In lieu of the somewhat formalized "twofold inquiry" applied in *New Jersey* v. *T.L.O.,*[21] petitioners suggest an office entry and inventory in the context under present scrutiny be deemed reasonable if conducted for a work-related concern. Such a test permits the involved government officials to identify the concern without judicial evaluation of the relative importance of various employment standards or rules. Such a test will spare government supervisors and administrators "the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense." (*New Jersey* v. *T.L.O., supra,* 469 U.S. , 83 L.Ed.2d at 735, 105 S.Ct. 733 (1985).)

Finally, there remains the question of the legality of the office entry and inventory in this case. It is undeniable petitioners had legitimate concerns regarding respondent's work-related conduct. Petitioners received reports of respondent's sexual harassment of other employees and questionable possession of a computer on state hospital grounds. Petitioners were also concerned about respondent's management practices.[22]

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[20] Cf. *Camara* v. *Municipal Court, supra,* 387 U.S. 523, 528 (1967); *Marshall* v. *Barlow's, Inc., supra,* 436 U.S. 307, 312-313 (1978).

[21] The test of (1) justification for the search at inception, and (2) reasonable scope of the search is too strict in the context of this case, as such a standard still requires a confined pre-justification process conducive to the purpose of illicit activity detection.

[22] Respondent was eventually terminated from state employment following an administrative hearing conducted by the State Personnel Board. An independent hearing officer found, inter alia, respondent engaged in sexual harassment on the job, coerced employees under his supervision to contribute money for acquisition of a computer, and improperly placed a resident physician under his supervision on administrative leave, all in violation of California Government Code section 19572. (Pet. App. A-9 to A-15.)

After advising respondent he was under investigation for these work-related concerns, petitioners authorized entry into and inventory of respondent's office situated on state hospital grounds. The Court of Appeals opinion in this case (footnote 2) notes that motivation for the "search" was proper. In fact, concerns that state records and files in the office needed to be secured and that the matters needed investigation prompted the inventory.

There can be no argument the purpose of the entry and inventory was properly related to work-related activity of respondent. This was not a "search" within the traditional meaning of the Fourth Amendment, i.e., by police officers in search of evidence of crime. Petitioners were not acting as agents of prosecution authorities, and no criminal proceeding was pending against respondent. The inventory, which consisted of no more than an attempt to sort government property from respondent's, resulted in personal items being boxed and available for respondent's pickup from a secured area.

It is clear that by any conceivable standard of protection that could apply under these circumstances, the entry and inventory of respondent's office was reasonable and not in violation of the Fourth Amendment. Petitioners respectfully submit that to find their conduct violated the Fourth Amendment would have a chilling effect on governmental supervision of its employees and result in a multitude of personnel matters being placed before federal courts in a § 1983 context, a result to be avoided. (*Bishop* v. *Wood*, 426 U.S. 341, 349 (1976).)

* * * * *

CONCLUSION

For the foregoing reasons, petitioners urge this Court to reverse the decision of the Court of Appeals[23] and determine that neither the entry into nor inventory of respondent's office in the course of an administrative investigation into respondent's work-related activity gives rise to 42 U.S.C. § 1983 liability, as no Fourth Amendment right is infringed thereby.

Respectfully submitted,
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[23] The opinion never addresses adequacy of state remedies for due process purposes (*Parratt* v. *Taylor*, 451 U.S. 527 (1981), and the parties have never raised the issue. Were the issue presented, petitioners submit the combination of the state's statutory scheme for personnel actions and state and common-law remedies would suffice. (See *Bishop* v. *Wood*, *supra*, at p. 349; *Davis* v. *Scherer*, *supra*, 468 U.S. 183, 82 L.Ed.2d 139, 148, 104 S.Ct. 3012, (1984).)

APPENDIX

LAWS AND RULES GOVERNING THE CALIFORNIA STATE CIVIL SERVICE

CHAPTER 8. *Separations From Service*[24]

Article 3. Disciplinary Proceedings

§ 19570.

As used in this article "adverse action" means dismissal, demotion, suspension, or other disciplinary action.

§ 19571.

In conformity with this article and the board rule, adverse action may be taken against any employee, or person whose name appears on any employment list for any cause for discipline specified in this article.

§ 19572.

Each of the following constitutes cause for discipline of an employee, or person whose name appears on any employment list:

(a) Fraud in securing appointment.

(b) Incompetency.

(c) Inefficiency.

(d) Inexcusable neglect of duty.

(e) Insubordination.

(f) Dishonesty.

(g) Drunkenness on duty.

(h) Intemperance.

(i) Addiction to the use of narcotics or habit-forming drugs.

(j) Inexcusable absence without leave.

---

[24] Statutory language is set forth as it existed in 1981.

(k) Conviction of a felony or conviction of a misdemeanor involving moral turpitude. A plea or verdict of guilty, or a conviction following a plea of nolo contendere, to a charge of a felony or any offense involving moral turpitude is deemed to be a conviction within the meaning of this section.

(l) Immorality.

(m) Discourteous treatment of the public or other employees.

(n) Improper political activity.

(o) Willful disobedience.

(p) Misuse of state property.

(q) Violation of this part or board rule.

(r) Violation of the prohibitions set forth in accordance with Section 19990.

(s) Refusal to take and subscribe any oath or affirmation which is required by law in connection with his employment.

(t) Other failure of good behavior either during or outside of duty hours which is of such a nature that it causes discredit to his agency or his employment.

(u) Any negligence, recklessness, or intentional act which results in the death of a patient of a state hospital serving the mentally disabled or the developmentally disabled.

(v) The use during duty hours, for training or target practice, of any material which is not authorized therefor by the appointing power.

§ 19573.

Any employee who is or claims to be a citizen of any foreign country or is or claims to be a dual citizen of the United States and of any foreign country with which the United States is at war or who has renounced his citizenship or allegiance to

the United States or has taken an oath of allegiance or otherwise pledged allegiance to any foreign country with which the United States is at war or who has committed or commits any act of disloyalty to or disrespect towards the United States or its Flag or who does any act or thing when the United States is engaged in war to obstruct the war effort or the defense preparations of the United States, in addition to any other penalties provided by law therefor, is subject to discipline under this article.

§ 19574.

The appointing power, or any person authorized by the appointing power, may take adverse action against an employee for one or more of the causes for discipline specified in this article by notifying the employee of the action, pending the service upon the employee of a written notice. Adverse action is valid only if a written notice is served on the employee and filed with the board not later than 15 calendar days after the effective date of the adverse action. The notice shall be served upon the employee either personally or by mail and shall include: (a) a statement of the nature of the adverse action; (b) the effective date of the action; (c) a statement of the causes therefor; (d) a statement in ordinary and concise language of the acts or omissions upon which the causes are based; and (e) a statement advising the employee of his or her right to answer the notice and the time within which that must be done if the answer is to constitute an appeal.

§ 19574.1.

An employee who has been served with notice of adverse action, or an attorney admitted to the practice of law in this state and designated by the employee, shall have the right to inspect any documents in the possession of or under the control of the appointing power which are relevant to the adverse action taken and which would be admissible in evidence at a hearing of the employee's appeal from the adverse action. The employee, or the designated attorney shall also have the right to interview other employees having knowledge of the acts or omissions upon which the adverse action was based. Interviews

of other employees and inspection of documents shall be at times and places reasonable for the employee and for the appointing power.

§ 19574.5.

Pending investigation by the appointing power of accusations against an employee involving misappropriation of public funds or property, drug addiction, mistreatment of persons in a state institution, immorality, or acts which would constitute a felony or a misdemeanor involving moral turpitude, the appointing power may order the employee on leave of absence for not to exceed 15 days. The leave may be terminated by the appointing power by giving 48 hours' notice in writing to the employee.

If adverse action is not taken on or before the date such a leave is terminated, the leave shall be with pay.

If adverse action is taken on or before the date such leave is terminated, the adverse action may be taken retroactive to any date on or after the date the employee went on leave. Notwithstanding the provisions of Section 19574, the adverse action, under such circumstances, shall be valid if written notice is served upon the employee and filed with the board not later than 15 calendar days after the employee is notified of the adverse action.

§ 19575.

No later than 20 calendar days after service of the notice of adverse action, the employee may file with the board a written answer to the notice, which answer shall be deemed to be a denial of all of the allegations of the notice of adverse action not expressly admitted and a request for hearing or investigation as provided in this article. With the consent of the board or its authorized representative an amended answer may subsequently be filed. If the employee fails to answer within the time specified or after answer withdraws his appeal the adverse action taken by the appointing power shall be final. A copy of the employee's answer and of any amended answer shall promptly be given by the board to the appointing power.

§ 19575.5.

At any time before an employee's appeal is submitted to the board or its authorized representative for decision, the appointing power may with the consent of the board or its authorized representative serve on the employee and file with the board an amended or supplemental notice of adverse action. If the amended or supplemental notice presents new causes or allegations the employee shall be afforded a reasonable opportunity to prepare his defense thereto, but he shall not be entitled to file a further answer unless the board or its authorized representative so orders. Any new causes or allegations shall be deemed controverted and any objections to the amended or supplemental causes or allegations may be made orally at the hearing or investigation and shall be noted in the record.

§ 19576.

Whenever an answer is filed by an employee who has been suspended without pay for 10 days or less the board or its authorized representative shall make an investigation with or without a hearing as it deems necessary; however, in the event an employee is suspended under subdivision (r) of Section 19572 for behavior or acts outside of duty hours, he shall, if he files an answer to the action, be afforded a hearing; or if he is suspended in more than three instances in any calendar year, he shall upon each additional suspension be afforded a hearing if he files an answer to the action.

§ 19578.

Whenever an answer is filed to an adverse action other than a suspension without pay for 10 days or less, the board or its authorized representative shall within a reasonable time hold a hearing. The board shall notify the parties of the time and place of the hearing. Such hearing shall be conducted in accordance with the provisions of Section 11513 of the Government Code, except that the employee and other persons may be examined as provided in Section 19580, and the parties may submit all proper and competent evidence against or in support of the causes.

§ 19579.

Failure of the employee to appear at the hearing shall be deemed a withdrawal of his answer and the action of the appointing power shall be final.

§ 19580.

Either by deposition or at the hearing the employee may be examined and may examine or cause any person to be examined under Section 776 of the Evidence Code.

§ 19581.

The board or its authorized representative shall issue subpoenas for witnesses for the employee upon his written request and at his cost. The board or its authorized representative may require such costs to be prepaid.

§ 19582.

(a) Hearings may be held by the board, or by any authorized representative, but the board shall render the decision which in its judgment is just and proper.

(b) If a contested case is heard by an authorized representative he shall prepare a proposed decision in such form that it may be adopted as the decision in the case. A copy of the proposed decision shall be filed by the board as a public record and furnished to each party within 10 days after the proposed decision is filed with the board. The board itself may adopt the proposed decision in its entirety, or may reduce the adverse action set forth therein and adopt the balance of the proposed decision.

(c) If the proposed decision is not adopted as provided in subdivision (b) each party shall be notified of such action, and the board itself may decide the case upon the record, including the transcript, with or without taking any additional evidence, or may refer the case to the same or another authorized representative to take additional evidence. If the case is so assigned to an authorized representative he shall prepare a proposed decision as provided in subdivision (b) upon the

additional evidence and the transcript and other papers which are part of the record of the prior hearing. A copy of such proposed decision shall be furnished to each party. The board itself shall decide no case provided for in this subdivision without affording the parties the opportunity to present oral and written argument before the board itself. If additional oral evidence is introduced before the board itself no board member may vote unless he heard the additional oral evidence.

(d) In arriving at a decision or a proposed decision the board or its authorized representative may consider any prior suspension or suspensions of appellant by authority of any appointing power, or any prior proceedings under this article.

(e) The decision shall be in writing and contain findings of fact and the adverse action, if any. The findings may be stated in the language of the pleadings or by reference thereto. Copies of the decision shall be delivered to the parties personally or sent to them by registered mail.

§ 19583.

The board shall render a decision within a reasonable time after the hearing or investigation. The adverse action taken by the appointing power shall stand unless modified or revoked by the board. If the board finds that the cause or causes for which the adverse action was imposed were insufficient or not sustained, or that the employee was justified in the course of conduct upon which the causes were based, it may modify or revoke the adverse action and it may order the employee returned to his or her position either as of the date of the adverse action or as of such later date as it may specify. The decision of the board shall be entered upon the minutes of the board and the official roster.

§ 19583.1.

Dismissal of an employee from the service shall, unless otherwise ordered by the board:

(a) Constitute a dismissal as of the same date from any and all positions which the employee may hold in the state service.

(b) Result in the automatic removal of the employee's name from any and all employment lists on which it may appear.

(c) Terminate the salary of the employee as of the date of dismissal except that he shall be paid any unpaid salary, and paid for any and all unused and accumulated vacation and any and all accumulated compensating time off or overtime to his credit as of the date of dismissal.

§ 19583.5.

Any person with the consent of the board or the appointing power may file charges against an employee requesting that adverse action be taken for one or more causes for discipline specified in this article. The employee against whom such charges are filed shall have a right to answer as provided in this article. In all such cases a hearing shall be conducted in accord with this article and if the board finds that the charges are true it shall have the power to take such adverse action as in its judgment is just and proper.

§ 19584.

Whenever the board revokes or modifies an adverse action and orders that the employee be returned to his position it shall direct the payment of salary to the employee for such period of time as the board finds the adverse action was improperly in effect.

Salary shall not be authorized or paid for any portion of a period of adverse action that the employee was not ready, able, and willing to perform the duties of his or her position, whether such adverse action is valid or not or the causes on which it is based state facts sufficient to constitute cause for discipline.

From any such salary due there shall be deducted compensation that the employee earned, or might reasonably have earned, during any period commencing more than six months after the initial date of the suspension.

§ 19586.

Within thirty days after a receipt of a copy of the decision rendered by the board in a proceeding under this article, the employee or the appointing power may apply for a rehearing by filing with the board a written petition therefor. Within thirty days after such filing, the board shall cause notice thereof to be served upon the other parties to the proceedings by mailing to each a copy of the petition for rehearing, in the same manner as prescribed for notice of hearing.

Within sixty days after service of notice of filing of a petition for rehearing, the board shall either grant or deny the petition in whole or in part. Failure to act upon a petition for rehearing within this sixty-day period is a denial of the petition.

§ 19587.

If the petition for rehearing is granted, the matter shall be set down for hearing by the board of its authorized representative. The hearing shall be conducted as to the matters on which granted in substantially the same manner and under like rules or procedures as an original hearing upon charges under this article.

§ 19588.

The right to petition a court for writ of mandate, or to bring or maintain any action or proceeding based on or related to any civil service law of this State or the administration thereof shall not be affected by the failure to apply for rehearing by filing written petition therefor with the board.

Supreme Court, U.S.
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CLERK

No. 85-530

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1985

Dennis M. O'Connor, et al.,
Petitioners,

vs.

Magno J. Ortega,
Respondent

On Writ of Certiorari
to the United States
Courts of Appeal for
the Ninth Circuit

BRIEF FOR RESPONDENT

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SUPPLEMENTARY CITATIONS

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TABLE OF CITATIONS

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ARMISTEAD v. City of L.A. (1957) 313 P2d 127, 152 CA2d 319: 25, 71
BALTIMORE AND OHIO RR. CO.v. Groeger, 26 U.S. 521: A-44
BELL v. Hand, 327 U.S. 84, 66 S.Ct. 777: A-44
BIVENS v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971): 92, A-36
BRAVERMAN v. Rosenthal, 102 CA2d 30, 226 P2d 617
BRYANT v. SPB (1950) 96 CA 2d 423, 215 P 2d 512
BUTZ V. Economu (1978) 438 U.S. 478: A-17
In re BUCHMAN's ESTATE (1954) 267 P2d 73, 123 CA2d 546, 47 ALR2d 291: 73
CAMARA v. Municipal Court (1967), 387U.S. 523: A-20
CAREY v. Piphus (1978) 435 U.S. 247: A-36
CHENKIN v. Bellevue Hosp. Ctr. N.Y.C. ETC. (S.D. New York 1979) 479 F. Supp. 1349: A-18
CHOCALLO v. Bureau of Hearings and Appeals, SSA (E.D. Pa. 1982) 548 F.Supp. 1349: A-18
COOLIDGE v. New Hampshire (1971) 403 U.S. 443, 91 SCt 2022, 29 LEd 564: A-42
DAVIS v. Scherer (1984) 104 S.Ct. 3012: A-33
DIVISION OF LABOR LAW ENFORCEMENT, Dept. of Industrial Relations v. Ryan Aeronautical Co., 106 CA2d Supp 833, 236 P2d 236, 30 LR2d 347: 51
FRANK v. State of Maryland, 359 US 360, 79 SCt 804: A-21
FURMAN v. Georgia, 408 US 238 (1972): 77
GILLARD v. Schmidt, 579 F.2d 825 (CA3 1978): 91

GRAHAM v. Scissors Tail, Inc. (1981) 28 Cal.32 807, 17 Cal.Rptr. 604: 76
GREGG v. McDonald, 73 CA 748, 239 P 373
In re HAMPTON'S ESTATE (1943) 131 P2d 565, 55 CA2d 543
In re HAMPTON'S ESTATE (1943) 131 P2d 565,55 CA2d 543: 50
HARLOW v. Fitzgerald (1982) 457 U.S. 800: A-20
HUTCHINSON CO. v. Coughlin (1919) 184 P 435, 42 CA 664
IECK v. Anderson (1881) 57 C 251, 40 Am.R. 115, 7 PCLJ 630: 49
KATZ v. U.S., 389 US 347, 88 SCt 507: 54
LAWLESS v. Calaway, 224 Cal.2d 81, 147 Pac.2d 604: 75
LYNCH v. Household Finance Corp., Conn. 1972, 92 SCt 1113, 405 US 538, 31 LEd2d 424, rehearing denied 92 SCt 1611, 409 US 911, 31 LEd2d 822, on remand 360 F Supp 720: 72
MANCUSI v.DeForte (1968) 392U.S.364: A-12
MAPP v. Ohio (1961)367 U.S. 643: 92, A-40
MARSH v. Alabama, 326 U.S. 501 (1946): 54
MARSHALL v. Barlow's, Inc. (1978) 436 U.S. 307: A-13
MARTINEZ v. California (1980) 444 U.S. 227: A-14
MASS. BOND. and Ins. Co. v. Industr. Acc. Comm. (1946) 74 CA2d 911 (at 913): 74
MICHIGAN v. Tyler (1978) 436 U.S. 499: A-14
MILSAP v. National Funding Corp., 57 CA2d 772, 135 P2d 407): 25
MITCHUM v. Foster (1972) 407 U.S. 225: A-16
MONROE v. Pape (1961) 365 U.S. 167: A-38
MT. HEALTHY CITY BOARD OF EDUCATION v. Doyle (1977) 429 U.S. 274: A-37
NEW JERSEY v. T.L.O. (1985 105 SCt 733, 83 L.Ed.2d 720: A-30

OLIVER v. U.S. (1984) 104 S.C. 1735, 80 L.Ed.2d 214: A-32
PARRATT v. Taylor (1981) 451 U.S. 527: A-33
PAUL v. Davis (1976) 424 U.S. 693: A-34
PEOPLE v. Superior Ct. (Tyler) (1981) 115 Cal.App.3d 557, 171 Cal.Rptr. 448: A-40
PERRY v. Sindermann (1972) 408 U.S. 593: A-35
PICKERING v. Board of Education (1968) 391 U.S. 563: A-35
PRUNEYARD Shopping Center v. Robins, 447 U.S. 74 (1980): 58
PUBLIC UTIL COMM'N v. POLLAK, 343 U.S. 451, 467: 37
ROTH, 408 US 589, 92 SCt 2715: A-24
SANDERS: 63
SCHERMBER v. California (1966) 384 US 757, 86 SCt 1826, 16 LEd2d 908: A-41
SCREWS v. U.S., 325 U.S. 91, 65 S.Ct. 10312: 39, A-42
SEE v. City of Seattle (1967) 387 U.S. 541: A-30
SHAFFER v. Field, 339 F.Supp. 997 (C.D. Cal. 1972), aff'd 484 F.2d 1196 (CA 1973): A-31
SKELLY v. S.P.B. (1975) 15 C2d 194: A-34, -60, -66, -69
SMITH v. SMITH (1954) 270 P2d 613, 125 CA2d 154: 75
STATE v. PINA, 383 P2d 167, 168: 89
TERRY v. Ohio (1968) 392 U.S. 1: 82, A-37, -41
TOSSMAN v. Newman, 37 Cal.2d 552, 233 Pac.2d 1: 75
U.S. v. BLOK, 88 US App DC 326, 188 F2d 1019, 1951: 89, A-41
U.S. v. COLLINS (2nd Cir. 1965) 349 F.2d 863: A-20
U.S. v. HAGARTY (7th Cir. 1968) 388 F2d 713: A-38, -39

U.S. v. HITCHCOCK, 467 F.2d 1107,1108 (9th Cir. 1972): A-40
U.S. v. KAHAN, 350 F.Supp.784 (S.D.N.Y. 1972, rev'd US 239, 94 SCt 1179), 39 L.Ed.2d 297 (1974): A-5, -29
U.S. v. KOWAL, D.C.R.I. 197 F. Supp. 401, 404: 63
U.S. v. Jacobsen (1984) 104 SCt 1652,80 L.Ed.2d 85: A-31
U.S. v. PLACE (1983) 103 S Ct 2637: 82
UNITED STATES v. RABINOWITZ, 339 U.S. 56, 69-70: 37
U.S. v. SKIPWITH, 482 F2d 1272 (5th Cir. 1972): 60
U.S. v. SPEIGHTS, 557 F.2d 362, (3d Cir. 1977): 60, A-40
VALLEY BANK v. Sup Ct (1975) 15 C3d 652,656, 125 CR 553,555: 60
WALTER v. United States (1980) 447 U.S. 649: 39, 62
WARD v. Strickland, 420 U.S. 319, 95 S.Ct. 999: A-44
WARING v. Dunlea, D.C.N.C., 26 F.Supp. 338,340: 58
WHITNEY v. California (1927) 274 U.S. 357,375: 37, 58
WILLIAMS v. Collins (8th Cir. 1984) 728 F.2d 721: A-19
WINSOR v. Silica Brick Co., 31 CA 85, 159 P 877
WYMAN v. Jeames (1971) 400 U.S. 309: A-6, -32

U.S. CONSTITUTIONAL AMENDMENTS

1st: 10, 18, 43, 53-54, 79, 92, A-35, -46
4th: 4, 43, 79-80, 82, 85, 87, 89, 91, 92, A-13, -(19-21), -(27-33, -35, -(38-41), -46
5th: 4, 43, 51, 72, 78-80, 85, 87, 92, A-28, -35, -46
6th: 72, 85, 87, 92, A-46

7th: 72, 92, A-46
8th: 72, A-46
9th: 43, 92, A-35, A-46
10th: 72, 78, 85, 87, 92, A-46
14th: 3, 31, 53, 72, 78, 85, 87, 104, A-(14-16), -(34-37), -47

CALIFORNIA CONSTITUTION

1972 Amendment: 88

STATUTES

18 USCA Sec. 242: A-42
28 USCA Sec. 2283: A-16
Sec. 1331: A-37
42 USC Sec. 1983: 4, 82, 105, A-16, -17, -33, -36, -38, -44
State Civ Serv Act: 10, 19

GOVERNMENT CODE SECTIONS:

3258: 78
6524: 91, A-67
11153b: 76
11180.5: 17, 91, A-67
11183: 91
14780: 74
18714a: 18
19302a: 21
19303a: 21
19572: 30
19574.5: 5, 8, 49, 51-52, A-6, -60
19581: 75
19582b: 76

SPB Rule 361a: A-11
Rule 361b: A-11
Rule 540: 18

MISCELLANEOUS

20 Am Jur 1043: 75
CAAP Sec. 2.41: 19
2 F. Harper and F. Jones, Law of Torts, Sec. 25.1 (1956): A-36
Jefferson, WORKS: 42, 87

Q. And you threw the original notes away that you had?

A. There was only -- I had just started to make the note, and I threw it away. It was no use to me.

Q. How many pages had you written before you threw it away?

A. Maybe two sentences.

Q. And what were you writing down, just making a log of the articles?

A. Yes, whether it was State or -- well, if I could define whether it was State or not State.

Q. You mean whether it should be State or personal property?

A. Right.

Q. And did you ask anyone else who is your superior whether that was okay to no longer log them?

A. No, I did not.

Q. You just decided that on your own?

A. That's correct. Well, I did talk to Mr. Friday and told him it was a difficult task and that I would not make a log, so I did not.

Q. And he said that was all right?

A. Yes.

Q. Do you know if anybody else made a log of these contents?

A. Nobody else did, to my knowledge.

Q. Okay. Mr. Stratton, maybe we better start first: Where are you employed at the present time?

A. Napa State Hospital.

QUESTION PRESENTED

Whether it is a violation of a government employee's civil rights for government officials to make a "two-sentence" administrative inventory of papers in a government office of which he was the sole occupant for 17 years while he is undergoing an administrative investigation, and to impound all its contents until same can be searched for rebuttal evidence against him or his witnesses during his prosecution.

LIST OF PARTIES

Petitioners: Dennis M. O'Connor, Richard Friday, Dorothy Owen, Stephen Donoviel

Respondent: Magno J. Ortega

TABLE OF CONTENTS

Opinion Below 1

Jurisdiction 3

Added Constitutional Provision 3

Statement of the Case 3

Summary of Argument 22
Arguments 42

ONE. THE STATE MUST ONLY BE AS STRONG AS IT NEEDS TO BE. 42

(a, 43), (b,51), (c,53)

TWO. EMPLOYEE'S EXPECTATION OF PRIVACY WAS RESPECTED FOR ALMOST TWO DECADES AND DID NOT HINDER INVESTIGATORS 59

(d, 60), (e, 64), (f, 67) (g, 72), (h, 77), (i, 79), (j, 80)

THREE. "ADMINISTRATIVE INVENTORY" WAS PREMATURE, UNNECESSARY, UNREASONABLE, INEFFICACIOUS, INTRUSIVE, INDECENT, AND DISRESPECTFUL OF PROTECTED RIGHTS 85

(k, 85), (l, 87), (m, 92), (o, 93)

CONCLUSION 102

ERRATA A-1

CITATIONS FOR PRIVACY AND IMMUNITY A-12

DEPOSITIONS, DECLARATIONS, ETC. A-48

TABLE OF CITATIONS (To be Supplemented)

ARMISTEAD v. City of L.A. (1957) 313 P2d 127, 152 CA2d 319

BRAVERMAN v. Rosenthal, 102 CA2d 30, 226 P2d 617

BRYANT v. SPB (1950) 96 CA 2d 423, 215 P 2d 512

In re BUCHMAN's ESTATE (1954) 267 P2d 73, 123 CA2d 546, 47 ALR2d 291

DIVISION OF LABOR LAW ENFORCEMENT, Dept. of Industrial Relations v. Ryan Aeronautical Co., 106 CA2d Supp 833, 236 P2d 236, 30 LR2d 347

FURMAN v. Georgia, 408 US 238 (1972)

GRAHAM v. Scissors Tail, Inc. (1981) 28 Cal.32 807, 17 Cal.Rptr. 604

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MARSH v. Alabama, 326 U.S. 501 (1946)

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MILSAP v. National Funding Corp., 57 CA2d 772, 135 P2d 407)

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SKELLY v. S.P.B. (1975) 15 C2d 194

SMITH v. SMITH (1954) 270 P2d 613, 125 CA2d 154

STATE v. PINA, 383 P2d 167, 168

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U.S. v. BLOK, 88 US App DC 326, 188 F2d 1019, 1951

U.S. v. KOWAL, D.C.R.I. 197 F. Supp. 401, 404

U.S. v. PLACE (1983) 103 S Ct 2637

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U.S. v. SKIPWITH, 482 F2d 1272 (5th Cir. 1972)

U.S. v. SPEIGHTS, 557 F.2d 362, 3d Cir. 1977.)

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WALTER v. United States (1980) 447 U.S. 649

WARING v. Dunlea, D.C.N.C., 26 F.Supp. 338,340

WHITNEY v. California (1927) 274 U.S. 357,375

WINSOR v. Silica Brick Co., 31 CA 85, 159 P 877

No. 85-530

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1985

Dennis M. O'Connor, et al.,
Petitioners,

vs.

Magno J. Ortega,
Respondent

On Writ of Certiorari to
the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR RESPONDENT

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth District was filed and entered on June 27, 1985 and is reported at 764 F.2d 703 (1985):

> The record in this case justifies a grant of partial summary judgment for Ortega on the issue of liability for an unlawful search; we will

therefore remand to the district court for an entry of judgment in favor of Ortega and for a hearing to determine the amount of damages.

The judgment of the United States District Court for the Northern District is not reported (nor its interpretation of the Chenkin test accepted: Cf. Addendum: A-65).

The decision adopted by the California Personnel Board on March 17, 1982 is also not reported (nor reportable with the Notices of Punitive Action). [1.1]

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[1.1] Decision was arrived at before the record was available to the Board (see reply, 'r', to petitioners, p. 36, or r. 36 and Ex. xi). A timely petition for rehearing was submitted and denied. The State Court hearing on Dr. Ortega's petition for writ of mandate has been postponed several times because the full administrative record had not been sent. Only after 'r' had been filed were missing parts received minus an unsigned "thank-you" note (Ex. 15a-1) to the donor of a printer which had started a warrantless search for forged documents (r. 17).]

ADDITIONAL JURISDICTIONAL GROUNDS
Appended in App213

ADDITIONALLY APPLICABLE FEDERAL LAWS
As in Reply to Petition and in A-46

OTHER VIOLATED CONSTITUTIONAL AMENDMENT

14th, Section 1 (r. 52): All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE (r. 3) [1.21-.22]

As in 'r', events/allegations (A) and fact-finding/errors (B) will be intertwined below for brevity and accuracy to disprove old and new charges (PB 24, etc.) now "noticed" in the record!

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[1.2] Cross-references will be made as before to appendix ('a') of reply ('r') to petition for writ of certiorari ('C'). Others will be to respondent's brief (RB) or its addendum (Add.) or to petitioner's brief (PB) or its appendix (PA) to distinguish all from those to Joint Appendix (J.A.) or the separate exhibits (App.).

> Excerpted documentation will be indented on both sides (like this paragraph), preceded or followed by quotations (not one's wishful inferences) from authorities directly addressing the issues under each sub-heading. If documentation and/or citations are too extensive, they may be separated but jointly cross-referenced/indexed.

A. Nature of the Controversy (Cf. App.)

> "(T)he Constitution is meant to be understood by the public."--John Marshall

Fifth and Fourth Amendment personal privileges and property rights violated under color of office brought this suit before federal court for review of civil rights violations under the Fourteenth Amendment and 42 U.S.C. Sec. 1983: This case arises out of a complaint by

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[1.22] Exhibits 1-21 were petitioners' during administrative hearing, Exx. A-000 and i-xxiv are respondent's.

(I-VI) are days of hearing, (VII) was ordered on the 5th day:p.111/line3 or (V:111/3): "(C)omplete your testimony in writing. . ."

respondent that petitioners (then Napa State Hospital employees at Imola, California) withheld earned income in excess of $10,000 without due process and restricted his rights of movement and assembly by illegally placing him on administrative leave (G.C. Sec. 19574.5). [2.1]

Dr. O'Connor -- (chief petitioner or "King", as in "the King can do no lasting wrong . . .", partly to save precious space to rebut "noticed" new charges and "findings", below) -- asked Dr. Ortega to stay away for one week (II:126, r. 16) so as not to inhibit interviewees (II:85, 86), not the

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[2.1] Respondent was director of an accredited network (r. 10) for four years of post-graduate training in psychiatry, the only one based in a state hospital (NAPA) in California. It is now, like Camarillo's further south, just another three-year residency training program.

investigators. [2.2]

King also told peon -- (or "pawn", as in ". . . because the Court protects all pawns") -- that he cannot enter the hospital grounds without written permission because Dr. Vaughn, also ex-con, complained of coercion to buy a computer [2.3], but that the ex-con's leave of absence complaint was a "closed issue". (King denied that he pronounced L.O.A. issue dead on II:140-141).

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[2.2] An unsigned thank-you note (Ex. 15a-1) was later alleged to have made investigators search for forged documents (II:168-170, r. 17-18). Their first ad hoc excuse was that they were only sorting out papers (Mr. Friday's deposition, p. 21) inside peon's second office in Imola (Ex. P, a. 3), which none of them -- or their superiors in the state capitol in Sacramento -- have entered without first knocking and waiting to be invited in, even if the door were open, for the last 17 years. (Many of them, including most of listed "real parties of interest", had also been to pawn's house in Napa Valley where he has another office.)

The King told the residents that Dr. Ortega was on vacation and was "so positive that all would be well Dr. Vaughn ask(ed) about possible retaliation when Dr. Ortega returned. Dr. O'Connor

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[2.3] The King had already thanked the contributors (Ex. 14) and pledged other computer accessories (Ex. 13), by approving sub-purchase orders for them. But his business manager, Mr. Friday, decided (I:112) the $75-Applewriter was another printer. His King HAD also thanked the donor of a $2,000-printer for "facilitating the dissemination of learning" (Ex. 15b). BUT, if the King had NOT already thanked its donor, he must have pledged a printer because all computers had to have one. So, IF there is a signed copy of the thank-you note to the donor of the printer, its signature must have been forged (II:170, r. 17) by pawn!

IF the King merely forgot (II:62, r. 7), an unsigned file copy (Ex. 15a-1) from pawn's office might YET suggest an attempt to deceive: AFTER his unforged signature was found in a signed copy (15b), the unsigned file copy was STILL introduced as evidence that he merely forgot, to explain WHY forgery was rumored! But Ex. 15a-1 turned up missing in December, 1981, from the administrative record sent to be filed in State Court!

reassured him by saying that Dr. Ortega was not that type of person" (Ex. T-2). King did not lie. [2.4]

After King adjourned the meeting with pawn's trainees, ex-con told them that there was also a "sexual harassment complaint". [2.5]

No complaints before or after the administrative leave order involved accusations which, under G.C. 19574.5,

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[2.4] Dr. Vaughn was worried that his cheating during the last annual exam would now be used against him, where before cheating among the hard-working was seen as caring enough to do one's utmost.

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[2.5] "Complaint" was from Dr. Elizabeth Reynolds, and the only one respondent was asked about when he was interrogated (III:6, 15) before he was dismissed without notice. (It was ten years old, before there was any such cause for punitive action against supervisors or co-workers, and Dr. Reynolds had graduated that many years ago, was in private practice, had co-led a seminar in family therapy with pawn, and is now helping him with a book on child development, of which more later.)

require such action (Argument "1-b", below). Nor can an "administrative inventory" investigate any of the complaints, old or new (PB 24, footnote 22). Only after searching pawns papers for forged documents did amateur investigation become an administrative inventory, when no forgeries were found among the file copies of the King's "thank-you" notes (II:168-170, r. 17). What was then inventoried was not in the locked office, but all copies of King's signed "thank-you" note given to the residents, who were ordered to return them and submit their canceled checks to prove that they contributed, or else face charges of insubordination! (More of this under Argument "1-c".)

Respondent is a board-certified specialist in psychiatry (1966), the youngest foreign medical graduate in

1959 to have received a special diplomate certificate. He had been Chief, Department of Professional Education, Mental Hospital, State of California, for almost two decades, without any written complaints against him, or any interruption of annual merit salary raises, the last for $3,648 on July 1, 1981! (For the King's bureaucratic dereliction of civil servant's duty, see II:136.) [2.6]

Respondent had a three-month-old grievance (the first he ever lodged) against Mr. Friday (r. 8). California State Civil Service is governed by laws that, in the spirit of the First Amendment, mandate early and open redress of --

[2.6] It is curious that Dr. O'Connor's first "performance report" on Dr. Ortega, -- who accepted him for psychiatric post-graduate training and awarded him for outstanding performance on graduation 10 years before, -- is a Notice of Punitive Action!

grievances before formal hearings, as well as periodic written reports to decide any proposed punitive action.

Whether because of the Peter Principle of progressive promotion up to level of incompetence or to discourage doctors from competing with cheaper professional managers, all hospital board certified diplomates in any specialty get about the same salary, -- whether as administrator, clinician, or educator, -- which is much higher than if one accepted a desk job at headquarters in Sacramento. [2.7]

Hospital doctors who are not specialists get paid twice as much as residents receive as stipend. These "grants" --

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[2.7] Dr. O'Connor refused offers of promotion to headquarters as long as increase in power meant a decrease in income. The salary offered had to be higher than he received as a psychiatrist before he would commute from Napa to work in Sacramento.

equal opportunity employment otherwise demand comparable salaries -- come from different agencies, state or federal, or from private income, usually their husbands'. Residents who obtain their medical license after the first year of training thus forego at the very least about $1,000 a month for three more years of tuition, if they opt not to join hospital staff. (Some drop out of the program to work, and are then counted in staff/patient ratios for budgeting level of care, and then drop back in to specialize in psychiatry, investing in themselves than in another car, etc. Before Dr. Ortega came, no alumnus of what was then the Napa-Sonoma residency training program passed their national boards specialty certification examination as psychiatrists on the first sitting.)

Only formally a Chief of Professional Education, Mental Hospital (or C.P.E., M.H.), respondent was full-time director of post-graduate training in psychiatry at Napa and other affiliates in Northern California (r. 10) over a 100-mile radius. [2.8]

Petitioner Friday, who had illegally delayed (under G.C. 14780 in Addendum) transmitting a computer training contract to departmental headquarters (r. 8), secretly seized respondent's hospital office before 0800 hours on --

[2.8] Most C.P.E.'s do not run residency programs, and another, J.E.J. below, lost hers in another hospital which lost its mental patients to make room for those who are developmentally disabled. (She had been at Napa half-time by respondent's invitation since then, to help with continuing education for professionals on the hospital staff.) Pawn's wide network of variedly prestigious affiliations kept his program accredited, even after Napa State Hospital was transferred to the Department of Developmental Services.

Friday, July 31, 1981 (Exhibit T-2, Declaration to Federal Court by Dr. Gandhi on March 9, 1984). [2.9]

Pawn's office locks were changed before respondent had officially started his forced "vacation" or illegally ordered administrative leave (Ex. R, r. 14-15). When it was officially over, and as he does every week-end it is idle, he returned to the hospital to pick up the "professional education department's computer" (as the King calls it, Ex. D-1).

Respondent's office key did not work,

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[2.9] Counsel, in PB 24 and by disagreeing with J. Marshall (above), would rather spare petitioners "the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense." (This quote had been taken out of context, as were citations in 'C'. "'Essential' Omissions" from 'PB' and 'C' are listed in Addendum, A-12 to A-38.)

but the computer room key did. [2.10]

It was later falsely alleged that petitioners seized his office only after the computer had "disappeared". [2.11]

Just before noon, a memo (Ex. S) extending pawn's administrative leave indefinitely, effective 0800 hours that Monday, was hand-delivered by an administrative trainee-investigator (Mr.

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[2.10] On re-cross-examination, pawn's secretary testified that her husband had already heard from the business manager, Mr. Friday, that Dr. Ortega had been dismissed (II:21) when she notified hospital security that, as usual, Dr. Ortega had called to ask whether he had office appointments that Monday morning, Aug. 17, 1981, and to tell her he had taken the training computer to work in his office at home. (Ex. 10)

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[2.11] Mr. Friday, as head of a team of amateurs investigating respondent, tried unsuccessfuly to get a court order to retrieve the training computer from respondent's office at home after it "disappeared" from another locked office adjoining respondent's.

Arnold). [2.12]

Pawn was not even asked about the computer (hospital business inventory does not list it as government property). [2.13]

Only later -- (Mr. Stratton's federal court deposition, p. 60) -- did pawn

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[2.12] Ex. S was back-dated the Friday before, one copy also to be sent to his office in the hospital and another to the wrong box in the federal post-office on the grounds which he has rented for both personal and professional correspondence for the last 17 years.

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[2.13] Dr. Ortega learned later that all his personal effects had already been hastily boxed the week before, and 22 or more numbered, sealed with tape that read "Evidence, Napa County Sheriff's Department" (Exhibit i-e), and moved. Some of his papers were copied: a few copies turned up in federal court after summary judgment had been handed down (Cf. Untimely Submissions in Addendum), submitted in secret by state counsel!

Pawn was not told where they were stored, nor when they would be returned (without the originals that had also been copied).

find out that selected folders from his locked files had already been removed to a safe ("evidence locker"). [2.14]

Investigators began to spread the rumor of sexual harassment by calls to pawn's correspondents out of state, and broadcast their suspicions of forgery (II:168) and fraud (Ex. xxi). [2.15]

Covert threat was to deprive pawn of reputation and license privately to practice his profession and of his

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[2.14] Second attorney of record equates this with "the common practice of a fellow employee's entry of an office to obtain a file or piece of correspondence, or borrow a paper clip" (PB 16, hereafter briefly referrable as the old "Square One" stance).

'PB', therefore, no longer claims the "essential" lie (a. 1) about removing "three personal items" (C. 3)!

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[2.15] Illegally extending the search for incriminating evidence extra-murally with leads drawn from medical files (King's deposition, Argument "2-d") violated of G.C. Sec. 11180.5.

employers' contribution to his pension after termination as educator if offer to accept his resignation did not work.

On August 28, 1921, Dr. O'Connor directly dismissed respondent by phone without written charges, promised to meet pawn personally, and then called back to back off from his promise, unless a co-petitioner was present. [2.16]

Four days later, after pawn had already been dismissed (Ex. 1), an undergraduate who was no longer at the hospital as a temporary student professional assistant improperly

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[2.16] Respondent protested through S.P.B. and appealed for referral to the Secretary of the Agency of Health and Welfare (Exhibit N) along grievance channels established under S.P.B. Rule 540, as mandated by G.C. 18714(a) to provide immediate redress (Cf. Add.) under the State Constitution in the spirit of the First Amendment.

complained of "sexual harassment": she was never under pawn's supervision. [2.17]

To proceed without resolving earlier grievances is unconstitutional under the State Civil Service Act. [2.18]

Dr. O'Connor announced in the HOSPITAL BULLETIN of Sept. 30, 1981, that "Dr. J. is a Chief of Professional Education and with her new duties, will be expanding her time base from one-half time to full-time. This change will take effect on October 1, 1981." [2.19]

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[2.17] Notice of Punitive Action dated Sept. 14 changed the effective date of respondent's dismissal to Sept. 22, 1981, but before he could protest against the written charges, Dr. Ortega was told a State Personnel Board hearing on his appeal had been scheduled for October 29, 1981, ahead of others already appealed (r. 21, CAAP Sec. 2.41 in Add.)

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[2.18] By disregarding its own rules (r. 21), S.P.B is therefore denying a jointly protected constitutional privilege to a California citizen.

It was openly claimed that petitioners have succeeded in depriving pawn of his retirement pension (Exx. T-2, -3). [2.20]

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[2.19] At one point, reiterated in PB 4, last line, to explain the expropriation of all his personal belongings, it was alleged that Dr. Ortega's office had to be vacated for his replacement even before he was dismissed in August without written charges.

J.E.J. did not want to take pawn's place even after he was officially dismissed, effective September 22, 1981. Dr. Ortega's office was never occupied while J.E.J. was in the adjoining office that he had given her.

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[2.20] Pawn was also told will be charged with Medi-Cal fraud (Ex. xxi, r. 53) and may be arrested before he can be tried for whatever else the "administrative investigation" may turn up (Exhibit L, r. 22).

B. Administrative Proceedings (Cf. App.)

To hold formal hearings before discovery can be completed was denial of due process, even if the hearing is quasi-judicial, but again essential in order to dismiss without documentation (Cf. App.)! [2.21]

Had the ground rules of G.C. Sec. 19302(a), 19303(a) and that of others cited (Cf. App151-153) been honored, much could have been saved.

Respondent has not yet recovered his social and professional reputation, and he has been "bad-mouthed" as a "woman-izer" before, during, and after the

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[2.21] On the eve of pawn's administrative hearing, a graduate student complained of being importuned three years before (I:39) when she briefly trained as an intern in the hospital social service department and opted to attend pawn's case conferences for the duration. She was "found" to be a "social worker" in Sacramento by the time she testified. Pawn did not even recognize her!

hearings by the publicity no other hearing had received before or since. Even in the tennis courts, he has been shunned by wives of mixed doubles teams. His wife suffered from cardiac irregularities (Ex. LL) after the charges against him were given unprecedented publicity. And he has not been able to afford to get away, except within driving distance of home, ever since.

INTRODUCTION AND SUMMARY OF ARGUMENT

Secrecy about California's intentions to search, seize, store, and steal contents of locked office was preserved throughout under (1) the umbrella phrase "investigation of management practices". During the administrative hearing, concern was expressed over (2) the "disappearance" of the "Professional Education computer" (Ex. D-1) from an adjoining office. Only in the federal

court did concern over (3) the residents' records (which were all filed outside respondent's locked office) become another excuse for breaking-in and burglary. To have raised it before would have reduced the credibility of complaint of coercion voiced by ex-con, whose record contained a report of cheating during the residents' last annual exam.

At no time was (2) the computer or (3) any files asked to be returned as hospital property. Neither the contributors nor the records nor (4) the residents themselves had ever been the hospital's responsibility, since (4) are not salaried as staff, and their training stipends and (3) equipment (e.g., of video studio) and administrative support come from different sources, personal or federal as well as

several state agencies. In fact, Napa's patient population was less and less a learning resource for clinical training in general psychiatry. Napa is more generally useful in facilitating paper processing and building maintenance for the professional education department, which keeps expanding its network of affiliations while the hospital itself shrinks. But any State remains liable for damages it could have avoided inflicting upon any civilian, employee or unemployed.

> An employer is required in all cases to indemnify his employee for losess caused by employer's want of ordinary care. Deering's Lab C Sec 2800.

If due process was violated by the search and seizure which led to the late Dr. Laskay's "preliminary internal investigative report", submitted after the adverse public reaction to the sum-

mary judgment -- Cf. Addendum, A-65 -- then even petitioners' decision to dismiss (the discipline imposed upon respondent on the basis of the investigation) is void.

1 Am Jur Proof of Facts 2d 549:

> Evidence of facts (BRAVERMAN v. Rosenthal, 102 CA2d 30, 226 P2d 617) or statements (MILSAP v. National Funding Corp., 57 CA2d 772, 135 P2d 407) inconsistent with the employer's contentions may be introduced to demonstrate the employer's asserted reason for a discharge was not the true reason.

There were two SERIAL excuses for privacy violations advanced in tandem:

1) 1st TWO weeks: suspicion (III:170, Ex. 15a-1) that Dr. O'Connor's signature to the thank-you note to the donor of a printer to hook-up with a computer bought without state money was FORGED, which warrants a warrant, and

2) AFTER August 17: recommendation in the "Misdemeanor/Incident Report of "Missing

Property" (training computer) that "this matter be turned over to the committee who are reviewing Dr. Ortega's department at this time, to determine if any CRIMINAL activity has occurred". (Page 2 of Exhibit 10).

Either, AND certainly both, will secure a search warrant. But the investigators knew they will have to specify what to look for, and that will not do, for they have not found anything so far. By Sept. 14, it was finally decided to work under the cover of qualified immunity for General Rubin (Deputy State Attorney) who kept COERCION out of his Notice of Punitive Action but took custody of expropriated private property.

Petitioners claimed (C. 3) that after their administrative inventory "to determine what records and other State

property was there" ("in respondent's locked office"), "three personal items", -- a semi-nude professional photograph of a model (Joyce Onne), her self-composed valentine card and a "standard book of poetry", -- "were removed as relevant to the pending personnel investigation against respondent." Were they seized because they were work-related? Or tantalizing? [I:a]

It is plain to see why petitioners want to go back to Square One (borrowing paper clips, PB 16) and plead that they are not being sued for the proper violations, after having been refused permission to plead their "good faith" --

[I:a] 'PB' is quite suddenly thunderously silent about what "were removed as relevant". Does their silence now mean a "No contest" plea? Or has their "amor propre" prevented candid acknowledgement of mistaken judgment that demeans and negates the cost-conscious bottom-line values their petition symbolizes?

to a jury. But, just in case that is also too late to raise, another justification for their position has been introduced, this time about having sued respondent improperly to begin with (details in Argument "1-a", Add.). [I:b]

After the S.P.B. hearing had started, state counsel threatened to use (Ex. JJ-2, r. 26, a. 6) and did use (III:90 - 92) Dr. Onne's "personal items" against Dr. Sutton's declaration (Ex. P) of long accepted practices that made respondent personally effective and hard to replace (a. 2).

II:3/10: After receiving Exhibit P:

> Mr. Rubin: At the hearing, I volunteered to present to Dr. Ortega some additional materials which have become relevant, only as a result of --

[I:b] 'PB' is a selective reiteration of 'C' and both show ABSENCE OF (1) regrets (apologies), (2) remorse (guilt), (3) reflection, and (4) reconsideration.

> the first hearing, when he handed me some statement of a former staff member of the hospital. [I:c]

The State seeks not only to invade personal privacy in government property but to violate professional confidences. (Cf. Dr. O'Connor's federal deposition, pp. 60, 73.) Confidentiality is an even older protected privilege than the tradition that what does not belong to the state belongs to its citizens. (Cf. Argument "1-c".)

Petitioners deny that a professional has privacy and property rights to his professional and personal files. In fact, permanent employees have property rights to their jobs besides, from which they can only be dismissed for cause. A

[I:c] The "female medical resident" (Dr. Onne, C. 3) has thus metamorphosed into a "former staff member" (Dr. Sutton, a. 6) and second attorney of record's thunderous silence, after reviewing the record, is now audible.

"sorcerer's chase" (Cf. Conclusion) for a cause to dismiss, even after elimination of inapplicable sub-paragraphs of Sec. 19572 (below), can be interminable. General Rubin had added two more (Cf. App. on Nature of Past Controversy) after the hearing was over, and second attorney of record still another in his 22nd footnote (Cf. Argument "1-a", Add.; PB 24.) The chase to prove secret sexual and coercive powers had first taken three amateur investigators -- one of whom, Dr. Laskay, is not a permanent employee, but an applicant for respondent's job after dismissal -- six weeks, and now three shifts of lawyers have extended it to five years. (Cf. VII:383, 387)

'C' also claims that "(o)ne of the state employees made several attempts to sort through the items in the office

trying to separate and identify State property from other items. Finding the task impossible, he eventually boxed the contents of the office and placed them in a locked room for the doctor to pick up". They had been "sealed" before respondent was dismissed with tapes which read in red letters, "Evidence, Napa County Sheriff's Dept.", and marked "Personal Property of Dr. Ortega, Oct. 7, 1981" (Exhibit i-e). Yet, General Rubin denied respondent's request to surrender them (Ex. W, r. 23) on Oct. 20, 1981, 6 weeks after his dismissal by phone.

It is easier to see now why returning to Square One is preferable to the prideful and prudent than pleading "No contest": Under the Fourteenth Amendment, the state does not need to act; it can, by inaction, deny equal rights. By

its own action, it has also violated state and federal laws according to the the authorities cited under points (a) to (o) in Arguments One to Three.

Both action and inaction are indisputably attributable to the state in the person of its accredited (if not rightful representatives, e.g., Dr. Laskay, administrative trainee Arnold), as in the denial of the right to confront witnesses by the refusal of the quasi-judicial hearing officer to issue subpoenas. The fact that the State must accredit the perpetrators for civilian (and human) rights to be violated means that the Constitution limits it in the interest of the basic freedoms that our Bill of Rights seeks to preserve. It is because the State enjoys a monopoly of power (which even the Court does not contest) that it is restrained from

coercion (by the Court with which it is not in contest). [I:d]

The State was also worried about the confidential trust BETWEEN investigator and interviewee, and hearing officer agreed that was privileged under a non-existent law (II:151), but not about the privileged communication between a

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[I:d] Only the Court, which cannot raise armies or levy taxes, enjoys perfect immunity, precisely because it cannot conscript or tax. Counsel is worried about the dollar cost (hereafter BLC or "bottom-line-consciousness) if this Court does not protect the King against his pawns.

B.L.C. was never a consideration for granting borrowed sovereign immunity, divine or secular, to Churches (sanctuaries), embassies (visitors) or executives (civilians).

Prosecutorial (Cf. Argument "2-d", footnote [d:4]) and quasi-judicial immunity are both less defensible in practice or fiscally (a. 7-10).

Cf. Add.: criss-crossing evolution of official immunity and personal privacy.

doctor AND his private patients whose files were desecrated. For loyalty to informers, the hearing officer defied a court discovery order (Ex. H), but turned his back on the judiciary.

If (1a) the hearing officer was biased and (1b) respondent should not have been dismissed, the State must have acted out of (2a) racial bigotry (jingoistic) AND (2b) sexual prejudices (miscegenophobic, Cf. App48) OR in cahoots with other parties (3) to steal Dr. Ortega's training funds (II:80), or to bag BOTH birds (dismissal and positions, r. 17) with one idly thrown stone: an ex-con's speculation about COERCION of contributions to a training computer the residents themselves wanted to use before their graduation (V:82).

If the proper way to view any violation of civil rights is as a whole,

-- as the decision against "separate but equal" education did, -- to do so is to weigh the CUMULATIVE EVIDENCE. The proper decision must address the question as to whether or not "administrative inventory" of, ever includes "impounding" all, non-contraband personal effects, and was so intended from the start and thoroughly implemented as such, in the light of all the facts.

The issue is not only whether every piece of evidence proves the violation of a protected or cherished right, which each easily does (a-o), but whether it is likely that all the relevant acts together (i to x, below) would have occurred without the initial excuse and abuse of (i) an invented and inventive "administrative inventory":

If an inescapable conclusion is that 'inventory' means 'impounding', not only

of "work-related" material but all personal memorabilia, then petitioners clearly have no right even to ask the Court for permission to proceed with a clearly illegal procedure. [I:e]

If (1) "the King can do no wrong --

[I:e] The shallowness of the pretext to exclude peon indefinitely and simultaneously to impound what is non-contraband and purely personal is highly suspicious of latent fears or concealed malice or both, since they usually coexist because they defend against and need each other or else malevolence is undeniable. (Can what is private to one be very disturbing to the deprived, and privacy must be guarded to preserve harmony as well as to reserve to oneself what is nobody else's business, shameful or not?)

Unchallenged to date is the principle that it is the invasion of privacy in a peon's rightful place, not the disturbance of property in a government castle, which the law seeks to prevent.

This precedent in law appears in Dr. Ortega's petition for writ of mandate but was never addressed, like all specific citations of case law and the California Constitution that respondent sent in advance of 'PB'. (Is their silence silent concession?)

because the Court can right every wrong" (respondent's paraphrase, Argument One),

(2) "American independence was then and there born" with the victory of the Fourth Amendment (Justice Frankfurter, UNITED STATES v. RABINOWITZ, 339 U.S. 56, 69-70, quoting John Adams, Argument Two), and

(3) "(t)he right to be let alone is indeed the beginning of all freedom" (Justice Douglas, PUBLIC UTIL COMM'N v. POLLAK, 343 U.S. 451, 467, Argument Three),

then "the final end of the State to make men free to develop their faculties" (Justice Brandeis, WHITNEY v. CALIFORNIA, 274 U.S. 357, 375, cannot be served by "administrative inventories".

The King is now before this Court to obtain immunity as sovereign, and the pawn only because only the Court has

absolute immunity or it cannot right all wrongs.

It cannot be seriously argued that California cannot train its psychiatrists without stealing Dr. Ortega's papers. (A copyrighted manuscript on senso-socio-sexual development is still missing.) The state does not claim educational enthusiasm to develop its citizens' faculties to the full as its end, only missionary zeal for non-erotic order and miserliness (B.L.C.)!

Did Dr. Ortega present a clear, present, and substantial danger to the interests of the State? Is he a dangerous man? Was he a public enemy or even privately evil? What is the wise and proper use of judicious decisions in reconciling power and freedom? Is the State getting weaker and the individual more licentious?

In this case the Court might have to choose between the people's mandate and legislative will against executive willfulness and "malevolence" (Cf. SCREWS in Add.)! California secured the right of privacy of every man, woman and child, retarded or not, by referendum, in the very first article of its Constitution. Can the subsequent legislative expression of it be declared unconstitutional to give state officials immunity in impounding personal property? [I:f]

In summary, respondent questions

i) the constitutionality of an "administrative inventory" by biased fellow --

[I:f] People are also protected not only against search and seizure of property which they are legally entitled to possess. Things may even be wrongfully in a person's possession -- stolen goods, for instance -- and the protection applies no less. (See also Justice Stevens in WALTER v. U.S., Argument "2-d", below.)

employees

ii) triggered by trivial complaints but

iii) conducted in employee's absence

iv) during an administrative leave improperly intended to separate him from his associates and

v) illegally ordered to facilitate search, seizure and stealing of souvenirs

vi) to blackmail pawn's possible witnesses in a quasi-judicial hearing

vii) hastily scheduled and unfairly conducted to dismiss a peon whom none of his employers has ever reprimanded or even criticized in 17 years by

viii) intimidating his legitimate union representative and thereafter

ix) withholding his already earned income to prevent hiring private lawyers

x) after failing to deprive him of his employers' contributions for over 17 years to his retirement pension by

convicting him of fraud (r. 40).

Pawn's answer is that there has been no administrative inventory (high-sounding excuse ended with "Maybe two sentences" in all, A-57), there has been no orderly investigation but a "sorcerer's chase" even in later briefs charging new causes for dismissal, no hearing but an inquisition jumping to conclusions, no trial but a lynching party passing summary judgment, followed by an exclusive ex-parte (Star-Chamber) post-mortem prompted by a dead man's discovered diary. [I:g]

--

[I:g] Whether or not God Hirself is dead, the King and his queens (pawns who have pushed to the eighth rank from Square One and cannot take being scorned) must be both tender-hearted and tough-minded, and ruthless and hard-nosed only with foreign enemies in our bosom or in Granada, etc. If they are not, the Court must ask the King change his ways and/or his courtiers for the sake of his subjects.

ARGUMENTS (Facts, Points, Authorities)

Cf. Reply to Petition (r. 41 - 59) for additional facts, points, authorities.

Each argument (1-3) introduces its points (a-o), all ending by summing up.

ONE

THE STATE MUST ONLY BE AS

STRONG AS IT NEEDS TO BE.

This is the reason behind our system of checks and balances that is unique in the American Constitution:

"The King can do no wrong because the Court can right every wrong."

RELATED BUT SEPARATE PART-ISSUES/EVENTS

"The whole of government consists in the art of being honest." Thomas Jefferson, WORKS, VI, 86.

IN SHORT, secrecy does not allow talking things out. It encourages fighting things out, -- sooner or later, -- or worse, suffering in silence, seething with violence, turning against each other.

(a)

Petitioners' "Administrative Inventory" Was Conducted In Secret, Unnecessarily, In The Civilian Employee's Absence (r. 15, 18-19). Const. Amend. 1,4,5,9.

One of the worst consequences of secrecy is the license it confers upon deceit. Will administrative inventories help the state discharge their rightful responsibility to maintain law and order or, as it has in fact done, encourage lawlessness and disorderly conduct?

Government workers should be shielded from reactionary governments. If petitioners had somehow misled enough people (though voters cannot be fooled all of the time) to reach the floor of the Constitutional Convention, they would likely have argued for special dispensation for state overseers and we would now be living under a Bill of State Rights that says:

> "Office entries and administrative inventories are reasonable if conducted for a work-related concern by government agents." (PB 24)

Petitioners have not claimed that to finish an administrative inventory it must be started in secrecy. But if they had framed the Constitution they would now be likely to argue to include that "reasonable" in the Bill of State Rights can well include proceeding in secrecy.

Because their representatives were not among the Founding Fathers, their followers now want to disturb the balance of powers and ask the judiciary for legislation ex-post facto to justify executive search and illegal seizure of souvenirs in an ADMINISTRATIVE paper INVESTIGATION of fantasied "sexual harassment of other employees and questionable possession of a computer on NAPA State Hospital grounds". PB 24.

"I. During an extended period (from July, 1970 through July, 1972), you sexually harassed a female Medical Resident (one of your supervisees) by stroking her hair as she walked down the hall or was in her office. . ."

Only a team of amateurs will conduct a paper search to clarify that or this:

Dr. Richard Vaughn was asked to speculate about coercion of fellow residents to obtain a training computer after he submitted his complaint about a surprise 6 months'separation (Ex. 4) instead of just a month's further delay of his medical rotation that he requested of Dr. Ortega. The idle suspicion of coercion was repeated verbatim as credible by the Personnel Officer (co-petitioner Owen) in her report to Dr. O'Connor. (Ex. 7.)

[Dr. Ortega had already told his ex-con that the 6-month clerical error was typographical (r. 12, I:52), and to

return the check that came with the notice. To assess ex-con's chronic suspiciousness, see his version of his conviction for fraud, I:47.]

II:103/19-24 (a. 20): None was coerced.

Dr. Laskay likewise denied coercion:

> "I do not recall any of the residents saying they had been coerced. That was not the charge." (III:9)

To protect Dr. Vaughn's credibility as a witness against impeachment by existing documents in the residents' records, a whole series of improprieties followed on the part of state employees:

1) Personal papers were impounded illegally with ease (during petitioners' initially protective and misguided search for incriminating evidence against ex-con) by some of the investigators interested in finding out about pawn's very private affairs.

2) To allow finding of "shock" at L.O.A. (mixed up with A.L. in PB 24!) on the part of ex-con in Proposed Decision (a. 19), the record of of the first day of hearing did not include p. 71 (recovered from S.P.B. archives):

> Dr. Ortega: When you left my office, you asked me to get the paperwork so that you don't get paid?
>
> Dr. Vaughn: I said if you thought you could deny me my salary, that you'd best get started because I intended to fight you about it.

Co-conspirators among petitioners could only corroborate (r. 13) the groundless suspicion they shared. Cf. I:52,58,98 (r.14), IV:40 in Appendix.

4) By the time Dr. Ortega deferred cross-examination of the first day's witnesses, reserving the right to confront them after his petition for full discovery was granted by court on Nov. 2, 1981 (r. 25, Ex. H), Mr. Rubin felt

it safe to recall his only witness to "coercion" to buy a computer, since ex-con would not have to answer questions that might refer to a recent report that he cheated during the annual examination of residents.

Incidentally, it was this report that prompted seizure of Dr. Ortega's office, in petitioners' zeal to protect the complainant whose idle speculations were the only basis for the illegal administrative leave order. (By casually asking the secretaries about training records, they finally located the report where it belongs, locked up with all training performance reports in their own filing cabinets in their office.)

4) Folios IV and VI were transcribed before Folio V. The early pages of Folio V contained damaging validation of original federal complaint of violation

of G.C. Sec. 19574.5 in forcing Dr. Ortega to "take a vacation" as unpaid administrative leave, thus depriving him of income without due process. Cf. App., V:18/10 (r. 51), and II:85, 86.

II:88 (r. 16): Due process was denied.

> Confiscations without judicial hearing and judgment after due notice are void for want of due process of law. IECK v. Anderson (1881) 57 C 251, 40 Am.R. 115, 7 PCLJ 630.

Ex. T-2: Chief Resident re Seizure, etc:

> Fr, 31 July 81: "When we got to the hospital, we found Mr. Friday talking to the secretaries and we were soon told that Dr. Ortega's office was locked, THE LOCKS WERE CHANGED, and that Dr. Ortega had been asked to take a vacation. We were told that there would be a special meeting with Dr. O'Connor on Monday . . . (Emphasis added.)
>
> Mo, 3 Aug: ". . . He was sorry for the investigation but it was the FIRST TIME that two people had complained, in writing, and he was obliged to look into it. . . He was very positive that NOTHING WOULD CHANGE and he spoke very fondly and highly of Dr.Ortega. . . but got Dr. Vaughn . . . sufficiently worried to

make him ask about possible retaliation when Dr. Ortega returned. Dr. O'Connor reassured him by saying that Dr. Ortega was not that type of a person." (The King barely remembers this meeting when cross-examined at the hearing.)

The existing climate did not mandate suspension of assembly or salary.

> The purpose of the constitutional guaranty that property is not to be taken without due process of law is to exclude arbitrary power from every branch of government, it being a restraint upon the legislative, executive and judicial departments. HUTCHINSON CO. v. Coughlin (1919) 184 P 435, 42 CA 664.

In any government of men, but not in law:

1) The covert object of illegal investigation is to discover proof of wrong-doing, rather than attempt to exonerate.

2) The covert object of tardily charging with wrong-doing is to convict, not to acquit.

> In re HAMPTON'S ESTATE (1943) 131 P2d 565, 55 CA2d 543, notice to party when rights are to be affected by a

judicial proceeding is an essential element of "due process of law".

IN SUM, "1-a" argues that secrecy was intended in order to seize and search, even if the salary of the employee on forced leave is stolen in order to steal from his papers what can be used against him. (At least, the Democrats did not pay their Watergate burglars.)

(b)

Divorcing A Peon From His Personal And Professional Associations Was Illegally Accomplished By Placing Him On Administrative Leave Without Pay For A Week, Extended To Two Weeks "Vacation", And Then Indefinitely, Even If The Investigation Was Not Done In Compliance With California Government Code Section 19574.5 (r. 15,19). Const. Amend. 5.

Paid vacation is a supplement to the employment agreement which in effect constitutes an offer of reward or additional wages for constant and continuing service. DIVISION OF LABOR LAW ENFORCEMENT, Dept. of Industrial Relations v. Ryan Aeronautical Co., 106 CA2d Supp 833, 236 P2d 236, 30 LR2d 347.

Pawn was not accused of (v) misappropriation of public funds or property, (i) drug addiction, (u) mistreatment of

persons in a state institution, (k) immorality, or (a) acts which would constitute a felony or a misdemeanor involving moral turpitude. These are the only accusations for which "the appointing power may order the employee on leave of absence for not to exceed 15 days. . . If punitive action is not taken on or before the date such a leave is terminated, the leave shall be with pay." Govt. Code Sec. 19574.5.

A week's administrative leave (II:126, r. 16) was extended to two weeks' "vacation" in order to avoid spreading ugly rumors before confrontation with rival academics (II:80-82, r.17) who chronically coveted training funds from every source (V:35, r. 11).

Respondent had been able to keep those the King called "cannibals" (II:80) away from his budget for 17 years and managed

to expand his program against all odds (III:122, a. 29). While still under "house arrest", he tried to get outside help to investigate old conflict of interest: Ex. SS (r. 11): Ltr to Atty. Gen. (App33)

IN SUM, "1-b" argues that the administrative leave order does not conform to the law that lists what accusations may invoke its provisions.

(c)

To Snoop ("2-d", below), (i) The Grounds Where A Peon's Second Office As Well As The Federal Post-Office Is Located Was Placed "Off Limits" To Him But, Even Worse, (ii) His Associates, In Turn, Were Also Barred From His Office At Home (r. 15, 19, Exx. R, S; AAA, T-2,3, ZZ below). Const. Amend 1, 14.

Ex. AAA: Memo fr Actg Dir, Psy Res Trng:

"August 17, 1981:

". . . The residents are not to have any official business with Doctor Ortega during his period of leave according to our administration. . .

"s/T.L.B."

The First Amendment imposes limita-

tions upon governmental abridgement of freedom to associate and privacy in one's association. USCA Const Amend 1. (KATZ v. U.S., 389 US 347, 88 SCt 507.)

In MARSH v. Alabama, 326 U.S. 501 (1946), the Court held that merely because a corporation owned title to a town, it could not impair ". . . channels of communication . . ."

California has withdrawn the right to exclude from the "bundle of property rights".

First Amendment "procedural rules" -- the presumptive invalidity of prior restraints, the doctrines against overbreadth and vagueness, and the requirements of scrupulous procedural safeguards -- are protective devices to assure adequate "breathing space" for free speech and to avoid the more obvious forms of infringement:

Ex. T-3(f-i), 9/2/81: A Senior Resident:

". . . The general feeling was

that it was a biased investigation but Dr. O'Connor responded that it was not. The credibility of an allegation of sexual harassment which occurred years ago was questioned.

"Complimentary statements about Dr. Ortega as a unique and competent chief were brought up by the residents. There were concerns about Dr. O'Connor's choice of Dr. Brannick as acting chief, and he responded that he didn't know Dr. Jeffress so well.

"I asked Dr. O'Connor whether the memorandum still holds about residents not being allowed to contact Dr. Ortega officially or unofficially was still binding. He said that Dr. Ortega was no longer officially connected with NSH and that the residents should feel free to contact him. He said he would call Dr. Ortega himself one day.

"I also asked Dr. O'Connor if the residents were still expected to produce the(ir) checks and 'thank-you' letters (to them) OR ELSE expect administrative action for insubordination. Mrs. Owens stated that we did not have to, unless there was a court order to do so." (Emphasis added.)

It was particularly improper that after testifying on 12/30/81 about their

need for the computer (V:82, a. 35), the part-owners were warned (Ex. ZZ, below) not to use it for their research projects outside the hospital: It was in their department's second office. Kept there, they knew it cannot be confiscated as "evidence", -- even if they refused to surrender the cancelled checks (proving they contributed) that the hospital demanded (Ex. T-3, above), -- after they found out that Dr. Ortega defrayed more than half its cost!

Is the following embezzlement under color of office even if the embezzler did not benefit:

Ex. ZZ: Memo fr new Psy. Res. Trg. Dir.:

"1/7/82 [AFTER V:82, 12/30/81 (a. 35)]:

> "The computer in Dr. Ortega's possession may not be used by any of the residents during the working day or on any official research projects.
>
> s/J.E.J."

Thus, by administrative fiat, even AFTER petitioners' half-hearted "administrative inventory" proved the computer was never processed as government property, -- like its desks but not their contents, and therefore belonged to the people if it did not belong to the state -- its owners are forbidden to use their own joint property for what they intended the computer to do when they decided together to buy it for their exclusive use.

Contributors and non-contributors were members of the Napa Alumni-Resident Association for continuing professional education and research and were discriminated against as such. How can owner-member-contributors to the training computer be legally denied the use of what they own and forbidden to

associate and peaceably assemble?

> In PRUNEYARD Shopping Center v. Robins, 447 U.S. 74 (1980), the Court declared that: "It is, of course, well established that a State in the exercise of its police power may adopt reasonable restrictions on private property so long as the restrictions do not amount to a taking without just compensation or contravene other federal constitutional provisions."

A major purpose of the First Amendment is to advance knowledge and reveal truth -- this is its purifying quality:

> In WHITNEY v. California (1927) 274 U.S. 357,375, Justice Brandeis concurred that: "(T)he final end of the State (is) to make men free to develop their faculties."

> Nothing can with greater propriety be called a man's "property" than the fruit of his brain. WARING v. Dunlea, D.C.N.C., 26 F.Supp. 338,340.

IN SUM, "1-c" argues that the right of professionals peacably to assemble for the advancement of science and to petition for redress of grievances was seriously compromised by the idle speculation of an ex-con about what should buy training equipment, savings or taxes.

TWO

PEON'S EXPECTATION OF PERSONAL AND PROFESSIONAL PRIVACY IN HIS LOCKED WORK-AREAS AT HOME OR THE HOSPITAL WAS REASONABLE, HAD BEEN RESPECTED FOR ALMOST TWO DECADES AND COULD NOT HINDER WHAT PETITIONERS "OFFICIALLY" WANTED (TO SECURE TRAINING RECORDS)

(Respondent's Reply to Petition, p. 41)

IN SHORT, the "three personal items" claimed to have been work-related had to be stolen because they are not discoverable as relevant and are, in fact, not presented to this Court as evidence that the "administrative inventory" was what it was claimed to be. (See III:6 about fictitious sexual harassment complaint to justify "removal". C. 3.)

"Necessity alone, whether produced by danger or OTHERWISE, does not in itself make all non-probable search-

> es reasonable -- the equation must also take into account the likelihood that the search procedure will be effective and the degree and nature of intrusion into the privacy of the person and effects of the citizen which the search entails. U.S. v. SKIPWITH, 482 F2d 1272 (5th Cir. 1972). (Emphasis added. see also U.S. v. SPEIGHTS, 557 F.2d 362, 3d Cir. 1977.)

(d)

> Respondent's Private (1) Medical Files And (2) Personal Correspondence Were Inspected And His Employers Violated Confidentiality By Second Use Of Information Thereby GAined (r. 22-23). Const. Amend 4.

Dr. O'Connor in his April 27, 1983 deposition, A-51, admitted reviewing respondent's private patient files.

We may safely assume that the right of privacy extends to one's confidential financial affairs (esp. medical billings) as well as to the details of one's personal life (in decade-old memorabilia). VALLEY BANK v. Sup Ct (1975) 15 C3d 652,656, 125 CR 553,555.

Ex. xxi (r. 52): Medical files misused:

TO WHOM IT MAY CONCERN:

I declare under penalty of perjury . . .

In the fall of 1981, while Dr. Ortega was under investigation and before the hearing started, the Director of Crestwood Manor in Modesto, California asked me if I knew a Dr. Ortega who was being investigated for Medi-Cal fraud. He was on the phone at the time to someone who had just informed him of that. . .

Executed in Oakland, California on July 9, 1982.

s/East Bay M.D.

A federal law dating back to 1825 makes it a crime to take mail before delivery to the addressee with design to obstruct correspondence or "to pry into the business or secrets of another," or open, secrete, embezzle or destroy. (Dr. Ortega's union membership card was out of its envelop when brought to his door. Cf. Argument "2-h", also.)

It is obvious that protection is afforded against snooping, even though the mail is not opened. A "taking" need be no more than picking up a letter to examine it. Eavesdropping itself [even before the invention of the telephone for paperless communication before computerized, MODEM-mediated (r. 6), transmissions] has been recognized as a crime by common law for centuries.

II:100 discloses who gave consent in pawn's absence, without asking for power of attorney to dispose of anything that strikes the various investigators' gamut of fancies.

In WALTER v. United States (1980) 447 U.S. 649, misdelivered pornographic films were screened by both the receivers and the FBI. Nevertheless, the Court deemed the FBI's viewing of the films an impermissible "search" without a search warrant.

Under the Fourth Amendment, any object

from which one person has a right to exclude another, even though temporarily, is a candidate for protection. (Exclusion means sealing or keeping the key to lock others out.)

The Fourth Amendment applies to a search whenever the government participates in any significant way in it. USCA Const Amend 4.

> When search and not arrest is real object of officers entering upon one's premises and arrest is pretext for or at most incident to search, there is "unreasonable search". U.S. v. Kowal, D.C.R.I. 197 F. Supp. 401, 404. See also CHADWICK and SANDERS in Add.

A "search" must begin with a plan and can continue until expropriation of the object thereof. (But what does pawn's 10-year-old souvenirs as Exx. 17, 18 and 19 prove about his work a decade later?) The police can only take what appears likely to be the products or instruments

of crime. This limitation is as basic as protection against involuntary self-incrimination to which it is a close kin. (For sure, warrantless officials cannot seal personal property as "Evidence, Napa County Sherrif's Office". Ex. i-e.)

IN SUM, "2-d" argues that personal papers were expropriated without due process in order to insure eventual termination of a permanent public peon with help from pawn's private files.

(e)

Can Peons Be Punished Without Charges? (r. 20) Const. Amend. 5.

II:21 (r. 58) pin-points date of decision, without written charges until 4 weeks later, to dismiss before computer "disappeared":

> Dr. Ortega's secretary: Well, when I left on Wednesday at noon, whatever -- as far as I knew, you were on administrative leave, I believe.
>
> Dr. Ortega: Right.
> A: When I came back, I

understood that you had been dismissed.

Q: And that was what date?
A: That was on a Monday, I think.

Q: Monday of the day --
A: That the computer --

Q: -- that I told you the computer --
A: The morning you called and said you had the computer.

Q: And who said I was dismissed then?
A: Doroty (Dr. Ortega's executive secretary) had told me. Now, wait a minute. I had understood that through my husband (Mr. Friday's chief engineer).

Q: That I was dismissed?
A: That you had been dismissed because of this investigatio.

Q: On that Monday, I had already been dismissed?
A: Yes.

Dr. Ortega: Thank you.

That same morning, respondent received a hand-delivered extension of his administrative leave, effective that day, though back-dated to the very Friday

when his "vacation" was supposed to end, but no questions about the computer, probably because the court had already refused to issue an order to retrieve it.

BRYANT v. SPB (1950) 96 CA 2d 423, 215 P 2d 512:

> If notice is required, the complaint must state sufficient facts to show that the accused committed some type of prohibited conduct.

See also SKELLY v. S.P.B. (1975) 15 C2d 194 (Minimum pre-removal safeguards, r.20) in Appendix.

> An unconditional and peremptory dismissal is of itself a sufficient prevention of performance to entitle the employee to bring his action for breach of contract. WINSOR v. Silica Brick Co., 31 CA 85, 159 P 877; GREGG v. McDonald, 73 CA 748, 239 P 373:

The "administrative inventory" of respondent's locked files had already been completed, all that was left was to

carry out the formality of charging him as soon as witnesses can be found.

IN SUM, "2-e" argues that the die was cast no matter what.

(f)

Peon Was Presumed To Be Guilty Of Tardy Charges And Must Appeal To Get A Hearing, r. 21. Const. Amend. 6.

When extra-mural investigation turned up nothing, tardy CHARGES WERE PADDED and sexual harassment of supervisees of other supervisors were added.

No attempt was made to amend a 1972 "sexual harassment" charge in Notice of Punitive Action, 9/14/81 (I:10, App.) despite its obvious ex-post facto quality:

> State Personnel Board asked all state agencies (Ex. F) on March 20, 1981 to "distribute a copy of your departmental policy statement" on sexual harassment "by June 15, 1981" and "send a copy of the policy by June 15 to the Personnel Board's Women's Program Unit".

Instead, as an indication of the

bankruptcy of the other charges, the "complainant" was the first witness called! Hearing Officer tried hard to find an excuse to have Dr. Reynolds testify to stale charges! It took all of three pages of consultation between hearing officer and present counsel for SPB defending his decision at that hearing before they finally excused her from the stand.

I:8/14: "Recall" of witnesses promised:

> Hearing Officer: Certainly, you may recall any witness you want.
> Dr. Ortega: Okay.
>
> Hearing Officer: Proceed, Mr. Rubin.
> Mr. Rubin: Thank you. I'd like to call Dr. Elizabeth Reynolds.

. . .

I:11/3: She denied living out of town:

> Hearing Officer: Are you planning on leaving the area? What -- would you be available if your testimony became important to this issue to this case?
> Dr. Reynolds: Yes.

> Hearing Officer: And you do live right here in Napa?
> A: I do.
>
> Hearing Officer: I see no reason in view of the fact we're striking that particular allegation, she shouldn't be excused at this time.

If NAPA was richer in "complaints", hers would not be left unamended for being outside the statute of limitations even for rape.

In hearing officer's need to find any corroboration whatsoever for sexual harassment of Caucasians, which failed throughout the hearing, one can find confirmation of miscegenophobia (App48).

The charges were tardily drawn because there were none that could be proven.

How can inefficiency be proven when respondent's is the last post-graduate psychiatric training program accredited for four years in a California's State Hospitals? But what is there to lose by

trying?

Even at this late date, and without asking petitioners, or reflecting that inefficiency is self-correcting, their second attorney of record attempts to support a charge of inefficiency by speculation (PB 16) that pawn's office and files are bound to be his "citadels of inefficiency". (Cf. App208) He had NOT EFFICIENTLY reviewed the record:

Hearing officer's apology (III:74) about absence of specific allegations of efficiency was forced by preceding testimony by the Stanford University Chairman of Psychiatry about respondent's extraordinary accomplishments (III:70).

Cf. App. for late and new charges:

Another hastily drawn charge has been more hastily and even more tardily redrawn (PB 24, footnote 22). Virtually

outdoing the speculative ex-con (PB 24) and without consulting petitioners, their counsel alleges, on behalf of our speculative ex-con, that respondent was improperly charged by those who had been expertly conned:

No coercion was charged in the Notice of Punitive Action, ex-con admitted it was "pure speculation" and both Dr. O'Connor and Dr. Laskay denied hearing any complaint of coercion. Yet the "fact-finder"/hearing officer heard it somewhere, and repeated it in his Proposed Decision as a basis for dismissal! Cf. App.

> An order of an administrative board based upon incompetent hearsay evidence contravenes due process and cannot stand. ARMISTEAD v. City of L.A. (1957) 313 P2d 127, 152 CA2d 319.

IN SUM, "2-f" argues that what started out as (1) a simple "witch-hunt" by real parties of interest, has become over-extended as (2) an endurance test into

(3) a marathon "sorcerer's chase" for alien secrets of coercive and sexual staying powers.

(g)

Can Ex-Peon Be Made To Pay The Equivalent Of More Than $10,000.00 Bail (r. 4) Until His Dismissal Is Sustained By Refusing To Issue A Single Subpoena He Requests In Writing? Const. Amend. 5, 6, 7, 8, 10, 14.

The right to enjoy property without unlawful deprivation, no less than the right to speak or right to travel is, in truth a personal right, whether the property in question be welfare check . . . or saving." LYNCH v. Household Finance Corp., Conn. 1972, 92 SCt 1113, 405 US 538, 31 LEd2d 424, rehearing denied 92 SCt 1611, 409 US 911, 31 LEd2d 822, on remand 360 F Supp 720.

Pawn wrote to King on 24 April 1982:

"Dear Mike,

". . . You may feel fully entitled to withhold warrants for the price of keys. . . Without malice, the total ($11,128.95) would have earned much more than the indebtedness ($595) to our computer training consultant whose contract was not transmitted for the approval it promptly received the following fiscal year. Who is teaching science data processing now? . . .

Ex. i (r. 4): Copy to State Court:

"14 June 1982

"Dear Mike,

". . . If it turns out only non-whites are deprived of the use of such legitimate earnings ($11.128.95) . . . the issue will have been well raised.

"As you know, money has little attraction for me, and I expect even my alumni to sacrifice it for once-in-a-lifetime opportunities, as when I advised you to accept the post of Director of Mental Health at reduced salary.

"Sincerely yours,

"s/Magno (Ortega)"

Due process of law excludes all arbitrary dealings with persons or property and shuts out all interference not according to established principles of justice, one of which being the right and opportunity to cross-examine, to meet opposing evidence, and to oppose with evidence. In re BUCHMAN's ESTATE (1954) 267 P2d 73, 123 CA2d 546, 47 ALR2d 291.

V:96: Hearing Officer: Well, he testified pursuant to my direction. He's entitled --

But he soon changed his mind (V:111, r. 31): Dr. Ortega was not to be heard, even for purposes of cross-examination.

After surrendering (II:30) the approved computer training contract previously withheld (II:43/22) in violation (r. 8) of Gov't. Code Section 14780 (App6), allowing clarification of Dr. Vaughn's leave of absence memo, etc. (App145) during his attempt at cross-examination, Mr. Rubin declined further confrontation.

> "We may suggest that cross-examination, if successful, is the most effective method of rebuttal, and frequently does away with the necessity of producing other rebuttal evidence (at 916)." MASS. BOND. and Ins. Co. v. Industr. Acc. Comm. (1946) 74 CA2d 911 (at 913).

Without further testimony in open court, no further public hearing would ever recover respondent's reputation. Its destroyer cannot be reheard and re-

cross-examined after having been excused without an excuse, because Dr. Laskay died during the deposition of the investigators.

> 20 Am. Jur. (at p. 1043): "A party is entitled to call as many witnesses as he deems necessary to the establishment of his claim or defence, subject to the power of the court reasonably to limit the number who may be heard upon any one issue."

For earlier promises and denials of witnesses, in violation of G.C. Sec. 19581 (r. 28, PA-6), see I:8 (a. 10), II:143 (a. 25), IV:5 (a. 31), and V:91 (a. 14) in Appendix.

> Even the denial of right of cross-examination -- (as distinguished from the right to call adverse witnesses) -- may constitute denial of due process. SMITH v. SMITH (1954) 270 P2d 613, 125 CA2d 154.
>
> "Offers of proof before calling adverse witnesses is not required by law, whether as a class or as individuals" (TOSSMAN v. Newman, 37 Cal.2d 552, 233 Pac.2d 1; LAWLESS v. Calaway, 224 Cal.2d 81, 147 Pac.2d 604).

Yet offers of proof (e.g., r. 16) were demanded at every turn, despite the governing law in administrative adjudication of the department of developmental services (G.C. Sec. 11513b, App165).

And the proposed decision was not shared (in violation of G.C. Sec. 19582b, r. 35, PA-6) and it contained findings (App184-208) that had nothing to do with the charges alleged in the Notice of Punitive Action.

In GRAHAM v. Scissors Tail, Inc. (1981) 28 Cal.32 807, 17 Cal.Rptr. 604, the California Supreme Court held that a contract provision requiring arbitration of disputes

> " . . . was unconscionable and unenforceable because it designated an arbitrator who, by reason of his status and identity, was presumptively biased in favor of one party. . . (E)ither the court must appoint the arbitrator on petition of a party or the matter "should proceed to a determination of the controversy".

(See also TEX-CAL LAND v. ALRB, a. 8; AP-

PLEBAUM v. Bd.of Dir., a. 7.)

> The due process clause also guarantees that no punishment may be arbitrarily or capriciously applied. FURMAN v. Georgia, 408 US 238 (1972).

Dismissal (after pre-judicial and quasi-judicial due process violations) from a position held without written criticism for 17 years is capital punishment for a professional whose career is thus cut down in its prime. It is unusual punishment in the face of overwhelming evidence that his performance is meritorious and, in fact, peerless among Directors of Residency Training in public hospitals throughout California.

IN SUM, "2-g" argues that what started out as quasi-judicial increasingly became farcical, at great cost in money (withheld earnings as "bail" and future income as a professional).

(h)

Can The State Pressure Peon's Union

Representative To Withdraw Legal Assistance Because Member Happens To Be Both A Manager And An Employee? Const. Amend. 5, 10, 14.

State-Employed Physicians' Agenda on Sept. 19, 1981 was changed to include as (8) New business (Exhibit CC): (d) "Defense of management as members"; (e) Local handling of grievances, after union was notified that Dr. O'Connor will be a member of the state bargaining team. In fact, the new items of business (d) and (e) were moved up and discussed longer than any other. But it had already been decided, without consulting member, that union counsel would decide the merits of his case before proceeding further, which had never been done before, since all members are entitled to assistance without prejudgment. (Cf. App29: G.C. Sec. 3528 and Ex. U-2; and II:138, where

Dr. O'Connor denies union experience!)

IN SUM, "2-h" argues that, as in medical care, legal assistance is harder for the not-so-poor and union representation and private counsel must be denied a sorcerer with coercive and sexual tendencies.

(i)

Can The State, Once The Hearing Has Started, Search Ex-Peon's Papers Again For Non-Contraband Materials To Inhibit His Supporters? Exx. P and JJ-2. Const. Amend 1, 4, 5.

Petitioners claimed in their petition that a semi-nude photograph, self-composed valentine card and "standard book of poetry" were seized because they were work-related (C. 3). All respondent's personal effects were impounded (Ex. W below, r.23) and then searched again after the hearing had already begun (II:3, III:11). Three ten-year-old souvenirs were selected and used to threaten (Ex. JJ-2) use of Dr. Sutton's declaration (Exhibit P, a. 2) of Dr.

Ortega's well-known effectiveness as an educator. Superior Court ordered them produced (Ex. H). They were introduced as evidence to rebut Dr. Sutton's testimony, and accepted by Hearing Officer with some alacrity (III:91).

Cf. Respondent's and Petitioners' Consolidated Citations in Addendum.

IN SUM, "2-i" argues that no stone was left in place that can hide the target, no niches went unsearched for supporters, no avenues remained unblocked for pawn to escape unwounded.

(j)

How Long Can State Impound (Commandeer Without War Or Hot Pursuit) Peon's Private Files? Exx. W, X, Y. Const. Amend 4, 5. [j:1]

Sealed before respondent was dismissed with tapes which read in red letters, --

[j:1] Should strictures against official conduct be more loose when the victim only loses his professional career rather than a career in crime? If life inside prison walls is what makes the court hesitate to convict, why are many convicts recidivists?

"Evidence, Napa County Sheriff's Dept.", and marked "Personal Property of Dr. Ortega, Oct. 7, 1981" (Ex. i-e), hospital counsel denied petitioner's request to surrender them and suppress their presentation as "evidence" on Oct. 20, 1981.

Ex. W (r. 23) is not "inventory-taking"?

Personal property all non-contraband:

> "All of them are available for your inspection at the hospital. We must respectfully deny your request however that any of the documents be suppressed or returned to you."

Exx. X, Y (r. 22): All files impounded:

Ex. X: 10/14/81, Copy to State Court:

> ". . . (R)eturn . . . all personal and business files and correspondence with patients and other persons.
>
> "Going through them and keeping them was unreasonable, when there is no compelling public need to do so, and is in violation of federal and state constitutional standards. . ."

Ex. Y: 11/31/81, Copy to State Court

" . . . I demand that you immediately turn over to me all that is mine, my private papers and any copies you have made so far. . .

"Unless you do, I submit you are in violation of 42 USC 1983."

In U.S. v. PLACE (1983) 103 S Ct 2637, Justice O'Connor held that "90-minute detention of defendant's luggage was unreasonable, and the violation of Fourth Amendment rights was exacerbated by agent's failure to tell defendant where they were taking the luggage, how long they would keep it, and how they would return it to him.

3. TERRY principles are applicable to permit investigative seizures of personal property on the basis of reasonable, ARTICULABLE suspicion, premised on OBJECTIVE facts that the luggage contains contraband or evidence of a crime. (Emphasis added.)

The articulable suspicion -- first spread as rumor and then admitted under oath -- was forgery, but what was seized was not evidence of forgery or of any crime.

5. In applying TERRY principles to investigative detention of luggage, Court must

> balance the nature and quality of intrusion on the individual's Fourth Amendment interests against the importance of the governmental interest alleged to justify the intrusion.

Allegation of forgery cannot be supported by presentation in evidence of unsigned document (Ex. 15a-1, II:168-171 in Appendix) to prove that "forgetfulness", not forgery, prompted seizure of locked office and search of locked files.

Only what the state has condemned and then processed as its property becomes its own, to do with as it pleases, copying what is incriminating. Yet petitioners kept insisting, after civil suit was filed in federal court, on returning to Dr. Ortega 22 boxes marked "Personal Property, Box No. 1,2,3, etc., October 11, 1981", some of which are still sealed with the red tape of

"Evidence, Napa County Sheriff". [j:3]

Administratively speaking, only the desk had been processed as state property. Its contents could not be claimed as belonging to the hospital (any more than the cars around it). [k:5]

IN SUM, "2-j" argues that warrantless search was followed by wholesale confiscation without explanation.

--

[j:3] The seal was broken in some boxes where the inventory list corresponding to the number of the box suggested to overworked and understaffed counsel for Napa where to find rebuttal evidence against Dr. Sutton's declaration in the form of Dr. Onne's ten-year-old photograph as a model, a self-composed Valentine card of the same vintage, and an even older volume of classic love poems.

--

[k:5] Private employers (PB 13) keep better business inventories of their property, without hiding behind the skirts of their company position.

THREE

PETITIONERS' "ADMINISTRATIVE INVENTORY" WAS PREMATURE/UNNECESSARY/UNREASONABLE; INEFFICACIOUS/INTRUSIVE/INDECENT, AND VIOLATED CIVILIAN PROPERTY AND PRIVACY RIGHTS PROTECTED BY THE BILL OF RIGHTS

(Cf. Reply to their Petition, p. 55)

IN SHORT, beyond intrusion and expropriation, state action betrays gross disrespect for common decency.

(k)

Does A Peon Have No Right To Expect Respect, As Well As Respect For The Law, From Government Officials? Const. Amend. 4-6, 10, 14.

The crucial test is not whether one agrees but whether one offers reasons for actions materially affecting the interests of others.

Only those disposed to violate rules which the community is disposed to enforce (ex-cons) should become subjects

of careful scrutiny, never for security or the enhancement of position. Each "right" asserted by one person is a limitation on the freedom of another.

In the present instance, the need arose to protect the complainant's credibility from impeachment by destroying or rendering inaccessible the only report of ex-con's cheating during the residents' annual oral examinations by two salaried hospital staff who are not members of respondent's faculty. [k:4]

Ironically, the report that the investigators sought and then euphemistically referred to in federal court as "resident training record" was written --

[k:4] Petitioners' ignorance of the routine filing practices of respondent's department prompted the "administrative inventory" of personal files in a locked drawer in a locked desk in a locked second professional education office that respondent had occupied a third of his life.

and submitted by Dr. Vaughn's second examiner, Dr. Laskay himself, who did not know where such reports are filed.

The corollary question is "Would any of the Justices secretly, in the dead of night, inventory the personal correspondence of any clerk of theirs after eleven months in their employ without earning a reprimand?"

IN SUM, "3-k" argues that though invasion may not have been intended to extend to indecent limits, it quickly did and there's no reason such searches can be contained, given the temptation that seizes the sexually or socially curious.

(1)

Does A Public Employee Become A Public Personage Without Rights To Privacy? Const. Amend. 4,5,6,10,14.

If, as Thomas Jefferson discovered,

"the whole of government consists in the art of being honest,"

civil authorities must be more open to scrutiny than celebrities. Yet the whole exercise in this instance was to

work in secret, muddy the picture, omit important documents from the public record, and demand that respondent be more open to questioning and examination of his private life than the petitioners of their public acts.

In California, concern for inadequate legal protection of informational privacy prompted a 1972 amendment to the State Constitution guaranteeing the right of privacy. Cf. WHITE in Add.

The Court also found the new constitutional right contains a private right of action and held that it REQUIRES the government to establish a "compelling justification" for violating the right. (Emphasis added.)

Personal correspondents were called by phone throughout the United States to obtain leads, even if their letters in pawn's files, including those from

alumni, could not be "work related".

A minor may not refuse if the parent agrees to official intrusion, but no official, whether legally appointed or trained, can waive the right of another adult to privacy.

> In U.S. v. Blok, 88 US App DC 326, 188 F2d 1019, 1951, a supervisor's consent to search by local police of a government employee's desk was held invalid under the Fourth Amendment. (For details, see Add.)

Only a judge can order a search and only for specific contraband, and the search must be conducted without dalliance, and once made cannot later be resumed. A Deputy Attorney General cannot re-search, even with a warrant.

Second search of premises based on same warrant as previous search was "unreasonable search". STATE v. PINA, 383 P2d 167, 168.

Ex. JJ-2 (r. 26, a. 6): Is this immune?

"Oct. 30, 1981 (1st day after hearing):

> "If you intend to introduce that document we will be compelled to offer rebuttal evidence which is in our possession. . . (We) have been unable to ascertain which documents will be needed to counter Dr. Sut-

ton's declaration (Ex. P., Cf. Argument "f" below). . . (W)e are hereby informing you that we do have relevant evidence bearing on Dr. Sutton's credibility and we do intend to use it should it be necessary. Finally, if you do introduce the declaration of Dr. Sutton, please so inform us by telephone so that we can subpoena her for cross-examination.

"s/Asher Rubin, Deputy Atty. Gen."

III:90-92: Souvenirs for "rebuttal"!

Mr. Rubin: Did you have sexual intercourse with (Dr. Ortega)?
Dr. Sutton: No, I never did.
. . .
Q: Did he ever kiss you?
A: Yes.

Q: Has he ever embraced you?
A: Yes, but not in a sexual fashion, in an affectionate fashion, almost the way you might kiss a child.

Q: All right. Is this a photograph of you?
A: Yes, that is. That was taken in a photo studio by a professional photographer.
. . .
Mr. Rubin: I'd like to introduce this as our next exhibit.
Dr. Ortega: Objection.

Hearing Officer Waller: Well, there again, it has very limited

> relevance, but as long as we are off on this tangent, it will be marked Exhibit 17, and it will be admitted.
>
> . . .

This cross-examination is continued in App169-170. See also G.C. 6254, 11180.5 and 11183.

> Justice Clark summarized, "(O)nce the right to privacy was enforceable against the states, the Court could "no longer permit that right to remain an empty promise . . . to be revocable at the whim of any . . . who . . . chooses to suspend its enjoyment. . ."

In GILLARD (cited in their opinion by the Court of Appeals panel that decided respondent was even more grieviously damaged than Gillard),

> the Court held that a school guidance counselor's locked desk and locked office were protected by the Fourth Amendment from warrantless search by other employees. (The counselor had manifested his desire to protect confidential notes profiling his counselee's psychological problems from "prying eyes" by locking up his desk and office.)

Other precedents that may be cited are also listed in Add., for comparison with petitioners' selected citations:

In BIVENS, Chief Justice Burger suggested that civil suits for offending officers might be a plausible alternative (e.g., to MAPP).

Petitioners' own citations do concur

(omitted parts literally in Add.)

IN SUM, "3-1" argues that no reasonably decent man will find secret search and seizure and storage and use against the owner of the tainted fruits of official warrantless intrusion reasonable by any standards cited in any precedent by a whole army of lawyers for the state.

(m)

Is There A Limit To The Number Of Laws Non-Military Officers Can Violate With Impunity? (r. 8, 22-23, 28, 30, 35, 51, 53; a. -16, -17, -37.) Const. Amend. 1, 4-7, 9-10, 14. Cf. Add. for list of violations and omissions.

Justice is the fairness with which benefits and burdens are assumed.

The official record proves a concerted effort to kill a career. The State understandably wishes there was a double standard of disclosure between employees and employers of their state. Pawn is

confident the Court does not, shall not, will not, agree to legitimize such a caste system of access to information.

IN SUM, "3-n" argues that a government of law does not allow government men to break the law regardless of their position in government.

(o)

Does Power Corrupt The Immune And Can Qualified Immunity Corrupt The Qualified? (a. 6). [o:1]

The Court will have to decide if petitioners denied the rights of persons ("p" to "z") by their official conduct and will again deny, under color of of--

[o:1] The first to claim legal immunity were fathers-owners of households for their conduct with citizens under their own roof. The second were the clergy in whose churches they insisted on sanctuary for their flock. The third were embassies who claim artificial sovereignty for the premises they occupy. The fourth are lawyers who have been granted absolute immunity as prosecutors or judges, but only for their behavior in court. Then came consenting adults for private conduct. And now, employers who claim they can do as they please with citizens under their employ.

fice, any person any of these rights:

p) to adverse information [o:2],

q) to unalienated affection,

r) to assemble with others,

s) to work until proven incompetent,

t) to use spend their money as they wish,

u) to presumption of innocence vs. doubts,

v) to be secure from all surveillance,

w) to proper investigative procedures,

w) to dependable redress of grievances

y) to access to impartial tribunals, and

z) to equal protection under the law.

Which of these personal rights, when they were clerks, are the Justices of this court and of all the courts below willing for love of the state to forego without an enemy without or for those

--

[o:2] Even "p" (the right to adverse information) does not require immunity against slander or libel for State hatchet men, if they were forthcoming and offended victim dared to sue, since the State is not spreading ugly rumors.

outside prison walls?

Does what a person, peon or not, leave in government property that does not belong to the state give its custodians the right to be privy to it, or that government officials can share what is there in secret, or with the public when it suits them? [o:3]

IN SUM, "3-o" argues that sovereign immunity when shared with agents of God or government was intended to preserve their own privacy, not by secretly violating that of another's by perverting public trust. (Only private perversions with mutual consent are legally immune, even if lethally contagious.)

--

[o:3] If petitioners did not feel above the law, or if they were not convinced the law had set them above ordinary citizens, would they have been so secretive and, when found out, because they were also indiscreet or boastful or both, so proud to claim qualified immunity for their actions as government officials as not to offer even a token apology for invading a person's privacy?

RESERVATIONS

It is curious that computer-resistant petitioners now come for permission to the Supreme Court to conduct secret administrative inventories when current technology render such procedures effortless and untraceable. Can the Constitution encourage computer literacy without idling bureaucracies or penalizing technocracies? [R:1]

Only the sub-purchase of additional video and training computer accessories were submitted for approval, and their purchase orders were signed by a duly constituted authority. Therefore no unauthorized purchases were made but even the approved purchase orders were --

[R:1] Bureaucracies tend to frown on individual initiative, and unusual resourcefulness is viewed as deviation. But post-graduate education in a public hospital cannot wait indefinitely for teaching equipment to be bought by taxpayers.

not honored, after signatory forgot he signed them.

In the dawning of space age technology, the video equipment (another monitor for which was included in the sub-purchase orders) and the training computer aboard the "post-graduate space shuttle" were not paid for by a paper-bound bureaucracy, but by private donors. Only the computer was bought with space age commuters' money. [R:2]

SUMMARY

1) As "statesmen", can we only see the --

[R:2] Some passengers developed "space sickness" and one was returned briefly to earth. Dr. Vaughn was to resume his journey of exploration after a month's L.O.A. (He did, on schedule, starting August 1, 1981). On earth while still sick, he was asked to speculate as to why he was not reaping the rewards of exploration of expanding space. He said it was because he did not contribute to the cost of the computer aboard. (Yet he was never invited to contribute, because he was a penny-pincher, and other non-contributors were on board.)

ship of state as critically leaking and slowly sinking all the time because of ever-present saboteurs on board?

2) Or, can we see ourselves as "villagers" living closely together on earth but in separate cottages, without feeling crowded out of the community by fences separating individual clans (professional guilds) or extended families (bureaus or or agencies).

3) Or, as "spacemen", can we see ourselves orbiting out yonder around each other with the assistance of technical instruments we must learn to use if we are going to be masters of space in real time, not later?

QUESTIONS BEFORE CONCLUSIONS

Was the State running scared in their haste to investigate without a warrant? Or were they afraid the judge would frown on their reasons for searching?

Is their fear a sign that the State is weakening in relation to the judiciary, and are now crying for injections of artifial immunity to increase their resistance to a creeping affliction of miscegenophobia? Is this Court their doctor or their judge? Is the government sick or its employees biased? [Q:1]

In still uncritical times, how many Justices are willing to say "No" when --

[Q:1] Miscegenophobia combined with fear of machine substitutes among paper-fed bureaucrats can fight back by sponsoring a marathon sorcerer's chase to run down or aground any source of envied or dreaded sex and electronics. These marathons may well become a regular feature of employment with more foreign rivals and better artificial intelligence. Male aliens are now competing where more Caucasian females find both increased self-esteem and a source of income. Both threaten computer illiterates who have only their natural wits to help them fight technocrats. Racist sexism coupled with compu-phobia can replace our class wars with a two-tiered caste system of biased bureaucrats and better technocrats.

the trespass of liberty becomes sufficiently blatant among those who suffer from a sieged garrison mentality? [Q:2]

The penultimate question left to be answered is "WHY NOW?" Dr. O'Connor had been told by Dr. Laskay during the annual examination of all residents that Dr. Vaughn had cheated and that he had reported it in writing to Dr. Ortega. If Dr. Laskay also told Mr. Friday about it, the report of the cheating must not be available to reduce Dr. Vaughn's cre-

--

[Q:2] Does God or government bless liberty? Or must people fight for it?

Animals guarantee autonomy to each other within limitations that are not questioned except briefly in mock combat, unless it is a matter of food or sex. We call it instinctive territoriality. Only in man does it become educated imperialism, religious or evangelical, local or political, multinational or economic. (None of above imperialists are actually starving, no one but Hinckley has attempted regicide for sexual reasons.)

dibility. Their only mistake is to suspect that Dr. Ortega locked residency training reports in his office, when in fact his secretaries filed them in their own locked filing cabinets. But once Dr. Ortega's personal correspondence was accessible for inspection, there was no stopping the investigators looking for what may be incriminating, to hide their mistakes. [Q:3]

The final question is WHEN did petitioners decide which papers were work-related and may be inventoried (and

--

[Q:3] Hard-workers cheat because they want to do well, not because they are bad. (If they are found to be greedy in the past and had been convicted of fraud, it is because they had been raised and taught to be selfish. Ex-con is a rabid Ayn Rand's fan, in prison or out, predictably -- for one can be ignorant but never inauthentic -- preaching rational self-interest to his fellow residents without much success: they are slightly ahead of him in their post-logical moral development).]

then seized for blackmail purposes)? Answer: After the hearing had already started! (II:3/10.) [Q:4]

CONCLUSION

I. First: forced entry was furtive. [C:1]

Such secrecy is suspect when it yields and takes control of a tantalizing --

[Q:4] The court ordered them produced as well as all other material gathered during the investigation. (Ex. H).

Thus, Exhibits 17-19 which were STOLEN from respondent were NOT RELEVANT until after the investigation was over. They were claimed by petitioners to be, but were not in fact, work-related, and therefore were not included in the appendix with their petition or even mentioned in their brief on its merits. They were discovered only after the court ordered that they be produced (Exhibit H) along with sub-purchase orders that were testified to but not presented as exhibits that first day hearing to prove pawn must be punished. --

[C:1] Nocturnal raid by Mr. Friday, p. 26 of his federal deposition (r. 50, A-54) cannot be countenanced as oversight "to maintain access to government records" (PB 8, footnote 5).

souvenir, even given California's sexually liberated climate of omnivorous curiosity, which encourages but does not immunize voyeurs. [C:2]

II. Second: furtive entry invented abortive inventory. [C:3]

III. Third: respondent's office was seized and his property impounded, in

--

[C:2] Search was originally intended to seize a report of cheating by the ex-con -- during the recently completed annual examination of all residents -- which would cast doubt on the veracity of his speculation of coercion (which was unquestionably denied by all contributors to their training computer anyway, without impeaching him over an error of judgment: he passed a repeat exam quite easily).

--

[C:3] Why should citizens pay the government for inventing an inventory it does not know how to conduct and gives up almost as soon as it is started (PB 8, footnote 5) without B.L.C. (legal cost/benefit bottom-line-consciousness of ANNUAL budget movements to cover PENDENT state claims)? Emphasis originally added for the congnoscente.

the course of a sorcerer's chase for secret sexual and coercive powers called an "administrative investigation" into respondent's work-distant activity.

IV. Fourth: this uncalled for sequence of state action gives rise to 42 U.S.C. Sec. 1983 liability, as the Fourteenth Amendment is infringed thereby.

RECOMMENDATIONS, REMEDIAL SUGGESTIONS

A. Can petitioners be forgiven their past mistakes, but the state ordered to make immediate restitution for the actual damages it allowed them to inflict, and to pay punitive damages to be decided by a jury, to dissuade future abuses?

B. To prevent future inadvertence by petitioners themselves, can they share paying the interest on actual damages, to save taxpayers the additional burden, and all of the taxes due thereto, out of their last salary increments or savings,

at a rate to be decided by a jury?

C. Since the legal requirements for placing an employee, permanent or not, for two weeks or less or indefinitely, had never been met, can the Court correct all past reversible errors by declaring such extreme measure to conduct an invented and aborted "administrative inventory" illegal and void, thereby reinstating respondent to status quo ante?

[Appended in Addendum are citations from the statutes and regulations, policies and practices, and rules and precedents that govern acceptable official behavior.

[Counsel had been invited repeatedly in writing to dispute prejudices imputed to petitioners, for which immunity is sought from this Court. Can continued silence be deccded "No contest"? Cf. Appendix.]

Respectfully submitted,

Magno J. Ortega
(707) 255-6726

ERRATA

As in the Appendix ('a') to the Reply ('r') to the Petition for Writ of Certiorari ('C'), this Addendum (Add.) to Respondent's Brief (RB) will first deal with what is easily disposed of in Petitioners' Brief (PB) and in the U.S. brief on behalf of a reversed decision.

In 'C', there was the "essential lie" (a. 1) about Exhibits 17, 18, 19 that were impounded as "relevant to the pending personnel investigation against respondent" (C. 3). Happily, such assertion is not repeated in PB.

But both PB and the brief for the U.S. (US) are replete with errors which are not necessarily lies unless they are repeated in reply to RB.

Errors may merely be from accidental misinformation or they may be wishful disinformation (Cf. No.34, this list).

Appended is available documentation for the corrections of most of the errors in both briefs which echo each other:

1) PB 3, US 11: No resident had ever complained of sexual harassment. The only harassment investigated was that of an alumna (Dr. Reynolds, III:7,21) who graduated ten years before. (Dr. Laskay, who had been her supervisee when he was a resident, asked her to write a letter about what he heard had happened before he came.)

2) PB 4, US 11: Indefinite administrative leave order (Ex. S) was dated Friday, August 14, 1981, and could not have been received before the week-end. It was in fact sent to the wrong federal post-office box on the grounds which was still off-limits to respondent, to his office in the hospital, which was still

off-limits, and then finally hand-delivered by an administrative trainee, Mr. Arnold, one of the amateur investigators, before noon on August 17, 1981, effective that day, and after the computer had been reported as "missing property" (Ex. 10), not "stolen", nor as "hospital property".

3) PB 4: There were no resident files in Dr. Ortega's office. They are all filed by the secretaries in their locked cabinets. The "female medical resident" (Joyce Onne) whose correspondence was stolen was an alumna (Dr. Sutton), who was Dr. O'Connor's chief resident in their graduating class ten years before.

4) PB 4: Dr. O'Connor would never accuse his teacher of theft.

5) PB 4: The lock to Dr. Ortega's office was changed before 0800 hours on Friday, July 31, 1981 (Ex. T-2), and its

contents were never inventoried. A-57.

6) PB 4: The necessity to secure the office which did not contain the computer is like closing the barn door after the cows have gone to pasture.

7) PB 4, US 3: The search did not secure any state property. In fact, all the contents of Dr. Ortega's office were returned to him after it had been searched several times (Ex. JJ-2), some copies made (Atty. Wainwright's letter to Judge Vukasin, A-62), and some souvenirs stolen (Exx. 17, 18, 19).

8) PB 4: The contents were not removed so that the office could be used by another employee (Announcement by Dr. O'Connor: Dr. Jeffress was recruited by Dr. Ortega and continued to occupy the office adjoining his even after the announcement.)

9) PB 5: The degree of intrusion was not

minimized by returning respondent's personal effects, which were refused even after the hearing had started (Exx. JJ-2, X, Y).

10) PB 5, US 3,10: Dr. Ortega had the only key except the janitors, who also had the key to the new lock (as did Mr. Friday, p. 26 of his deposition, A-54) to use after hours. Cf. KAHAN, A-29.

11) PB 6, US 3: The search, seizure, storage and stealing of ten-year-old souvenirs (Exx. 17, 18, 19) are not necessary or reasonable, even in private business. They are not concerned with "work-related activity".

12) PB 8, US 3: The items in the office were taken to an investigator's office (Mr. Stratton's deposition, p. 59) and some moved to an "evidence locker" (p. 60). All were kept after respondent demanded their return. Exx. W,X,Y.

13) PB 10, US 11: The prerogative to remove government employees whose conduct hinders efficient operation and to do so with dispatch is governed in California by Govt. Code 19574.5 which specifies which conduct warrants immediate exclusion, and does not apply to respondent.

14) PB 13: Benefactors may not enter welfare beneficiaries home without advance notice (Cf. WYMAN, A-32).

15) PB 14, UA 12: Service to the public is enhanced by the predictability of the institution. In fact, an unpredictable group of services cannot be institutionalized. So must institutional predictability characterize its behavior towards its employees, or they cannot function. They must be told they are going to be intruded upon in order to accommodate to such interruptions:

PB 5 "on general inspection policy", US 4 on office inventories being "reserved to employees who were departing or were terminated".

16) PB 16: Access to offices does not include impounding its contents.

17) PB 16, US 17,19,21: Expropriation of personal memorabilia is not as common as borrowing a paper clip or a pencil (US 7) or a book (US 11).

18) US 6, 15, 17: Search was made for forged documents, Dr. O'Connor having forgotten that he signed one of them.

19) US 6: Petitioners also wanted to locate a report of cheating by the resident who complained his fellow residents were coerced to get a computer (it was actually their idea).

20) US 7, 9: The private patient files were in order to supplement the loss of mental patients for teaching when Napa

was transferred to the Department of Developmental Services to look after the developmentally retarded.

21) US 9: IBM files were also for training, before computers got cheaper.

22) US 9: Respondent's assertions are documented herewith from noticed administrative proceedings.

23) PB 16: No search for the sake of oversight is ever allowed unless it is routine practice.

24) PB 20: Prior recognition of institutional deficiency resulting in demonstrable damage dictates changes in policy, not ad hoc decisions to search.

25) PB 24: Non-naturalized citizens may get away with ignorance of the American Bill of Rights, but not aliens.

26) PB 24, US 11: Petitioners never lodged a prior grievance against respondent or else they are derelict in

reporting their legitimate concerns regarding his work-related conduct in mandatory performance reports.

27) PB 24, US 11: Coercion was denied by all residents, including complainant who acknowledged it was "pure speculation" (I:58, 98) and by Dr. O'Connor (II:103) and Dr. Laskay (III:9). Was hearing officer hearing other voices?

28) US 3: Overtime "work" must be training-related or "workers" will complain to EEOC for being exploited at work; the curriculum is entirely respondent's responsibility, and he is accountable to its contents only to a national accrediting body. His trainees are not paid by Napa, but are supported out of separate budgets of different state agencies and from federal or other sources, including family savings.

30) US 2: Dr. O'Connor testified he did

not even remember signing some of the papers on the same day (II:62). He never checked whether he misheard or misremembered.

31) US 2: The computer training consultant contract (Ex. 16b) was approved on July 15, 1981, "effective immediately" (GC 14780) before respondent was placed on administrative leave!

32) PB 24, US 2,3: Complaints of "sexual harassment" were made by undergraduates who were never respondent's supervisees (all postgraduate trainees specializing in psychiatry), both of whom had already left the hospital when they complained after respondent had already been dismissed. (I:25, 39).

33) PB 24: The resident who complained someone may have felt coerced to contribute was placed on LOA, not AL, because he no longer had sick leave left

but still wanted to delay resuming interrupted rotation for one month (App142). A month's L.O.A. without pay is the maximum SPB Rule 361a allows:

> "An appointing power may grant leave of absence without pay to an employee for a period not to exceed 30 calendar days" under S.P.B. 361b: ". . . 4) for illness . . . or 5) for some other reason equally satisfactory as determined by the appointing power."

See also SPB hearing officer's stand on these old existing arrangements, I:69. Attorneys of record in their "citadels of efficiency" (App211) should more efficiently inventory their record before including any new charges under the wrong code provisions in their briefs. (PB 16's speculative charge of "inefficiency" had also already been dismissed by the hearing officer, III:74.) US 11, 12.

34) US 21: See US 2 about where the

computer was kept. Why the careless error? Are computers mobile robots?

With facts, arguments would not just be opinion but a question of digestion.

STATE AND FEDERAL PRECEDENTS VIOLATED:

IGNORED IN PETITIONERS' CITED CASES:

[What follows may not exactly counter all petitioners' cited claims, but the same source qualifies each of them enough to blunt the final point of their argument to mislead the Court to legislate what the California legislature cannot, after the people by referendum in 1972 amended their Constitution to protect their privacy:

[Civil Code Section 1798.1: The Legislature declares that the right to privacy is a personal and fundamental right protected by Section 1 of Article 1 of the Constitution of California and by the United States Constitution and that all individuals have a right of privacy of information pertaining to them.]

i) Mancusi v. DeForte (1968) 392 U.S. 364:

1. Fourth Amendment provision against unreasonable searches does not shield only those who have title to the searched premises.

2. Capacity to claim protection of Fourth Amendment provision against unreasonable searches and seizures depends not upon property rights in invaded area but upon whether area was one in which there was reasonable expectation of freedom from governmental intrusion. U.S.C.A. Const. Amend. 4.

6. (Even) state officials' possession of a district attorney's subpoena duces tecum calling on union to produce certain books and records did not bring warrantless search of union office within exception to rule that search of private property without proper consent is "unreasonable" unless it has been authorized by a valid search warrant. U.S.C.A. Const. Amend. 4.

ii) Marshall v. Barlow's, Inc. (1978) 436 U.S. 307:

2. Exception from search warrant for . . . liquor and firearms . . . is the exception, not the rule.

6. Reasonableness of warrantless search depends upon specific enforcement needs and privacy guarantees of each regulatory statute.

7. Incremental protections . . . are not so marginal that they fail to justify administrative burdens that may be entailed . . . (W)arrant provides assurance from neutral officer that inspection is reasonable under the Constitution, is author-

ized by statute, and is pursuant to administrative plan containing specific neutral criteria, as well ad advising owner of scope and objects of search beyond which limits inspector is not expected to proceed. U.S.C.A. Const. Amend. 4.

iii) Martinez v. California (1980) 444 U.S.227:

Parolee-murderer was not an agent of the California Parole Board. (This decision denied his victim damages, and is cited to deny California's liability in the present case, by fanciful legal somersault.)

iv) Michigan v. Tyler (1978) 436 U.S. 499:

4. Warrantless search of burned premises cannot be justified on ground of abandonment by arson until arson has been proved, and conviction cannot be used ex post facto to validate introduction of evidence used to secure same conviction. U.S.C.A. Const. Amend. 4.

5. Search for administrative papers, like search for evidence of crime, are encompassed by Fourth Amendment.

8) To secure warrant to investigate cause of fire, officialmust show more than bare fact that fire has occurred.

In the present instance, search

prompted by complaint of coercion to rescue complainant from impeachment by destroying report of his cheating, did not even result in charge of coercion.

19. . . . (N)umber of prior entries, scope of search, time of day when proposed to be made, lapse of time since fire . . . might all be relevant factors, and magistrate can perform important function of preventing harassment by keeping . . . invasion to a minimum. U.S.C.A. Const. Amend. 4.

No magistrate would find petitioner Friday's nocturnal search "reasonable". (His deposition, p. 26, A-54).

23. Failure to present federal question in conformance with state procedure constitutes adequate and independent grounds of decision barring review in U.S. Supreme Court, so long as state has legitimate interest in enforcing its procedural rule.

State has no policy to safeguard employees from "official fishing expeditions", nor has it tried to limit its scope, but asks the Court for blanket permission to search, secretly

or otherwise.

v) Mitchum v. Foster (1972) 407 US 225:

3. There is a fundamental policy against federal interference with state criminal prosecution. 28 U.S.C.A. 2283.

6. Only in case of proven harassment or prosecution undertaken by state officials in bad faith without hope of obtaining a valid conviction and perhaps in other extraordinary circumstances when irreparable injury can be shown is federeal injunctive relief aginst pending state prosecutions appropriate. 28 U.S.C.A. 2283.

8. Other "implied" exceptions to blanket prohibition of anti-injunction statute are recognized . . . permitting a federal court to enjoin relitigation in a state court of issue already decided in federal litigation. . .

11. Provision of Civil Rights Act authorizing a suit in equity to redress deprivation under color of state lasw of any rights, privileges, or immunities secure by Constitution was intended to enforce provisions of Fourteenth Amendment against state action, whether that action be executive, legislative, or judicial. 42 U.S.C.A. Sec. 1983; U.S.C.A. Const. Amend. 14.

12. Congress . . . was concerned that

state instrumentalities could not protect those rigts; it realized that state officers might, in fact, be antisympathetic to validation of those rights.

Hea ing Officer himself applauded (II:169) "fishing expedition" for forgeries and other evidence of wrongdoing!

13. Purpose . . is to interpose federal courts between the states and the people, as guardians of the people's federal rights and to protect the people from unconstitutional action under color of state law, whether that action be executive, legislative, or federal. 42 U.S.C.A. 1983.

vi) Butz v. Economou (1978) 438 U.S. 478:

7) All individuals are subject to federal law. Officials must bear the burden of showing that public policy requires exemptions of that scope.

8) This burden, when discharged, entitles them to qualified immunity, except where it is demonstrated that absolute immunity is essential for the conduct of public business.

13) Agency officials who perform certain functions analogous to those of a prosecutor and who are

responsible for the decision to initiate or continue a proceeding, subject to agency adjudication, are entitled to absolute immunity.

vii) Chenkin v. Bellevue Hosp. Ctr. N.Y.C. ETC. (S.D. New York 1979) 479 F.Supp. 1349:

1) Does the person claim a reasonable or a legitimate expectation of privacy that has been invaded by government action? Did the individual's conduct evince an actual, subjective expectation of privacy? Is that expectation, when viewed objectively, justified under the circumstances?

4) Three factors are crucial to weigh private vs. public interest under the Fourth Amendment: (1) strength of public necessity for the search, (2) efficacy of the search, and (3) degree and nature of intrusion upon the individual.

viii) Chocallo v. Bureau of Hearings and Appeals, SSA (E.D. Pa. 1982) 548 F. Supp. 1349:

19) When sole purpose of search of offices was work-related and reasonably forseeable by plaintiff who had refused active efforts of her supervisor to locate and remove case file, which was government property, . . . two administrative law judges . . . entering and searching former administrative law judge's office to obtain file did not amount to vio-

lation of former law judge's Fourth Amendment rights. U.S.C.A. Const. Amend. 4.

24) When director communicated to plaintiff the basis for non-promotion was discipline-related, director had authority to recommend adverse action for plaintiff's actions which were deliberate impediments to execution of delegated authority, although director erred in not processing plaintiff's promotion or grade increase.

25) Where plaintiff defied lawful directions, she assumed risk of adverse action for deliberate insubordination, and was not harassed and retaliated against for exercising independent action.

26) When plaintiff did not indicate what documents, if any, were improperly collected and disseminated, nor indicate manner in which defendants collected such data, complaint of violations of Privacy Act that were not relevant and necessary . . . was subject to denial.

29) Any liability for violation of Privacy Act rests only upon agency and not individuals.

ix) Williams v. Collins (8th Cir. 1984) 728 F.2d 721:

10) Defendants were entitled to absolute immunity only for common-law liability for defamation, search

(not seizure, Exx. 17-19) reasonably calculated to help investigation or simple inventory of material was within line of duty and defendant's had duty to investigate and remove employee if necessary.

x) Harlow v. Fitzgerald (1982) 457 U.S. 800

4) Under "functional" approach to immunity, immunity of government officials extends no further than its justification warrants.

8) Qualified or "good faith" immunity is affirmative defense that must be pleaded by defendants.

xi) United States v. Collins (2nd Cir. 1965, not 1963) 349 F.2d 863:

9) Room in which defendant's jacket was hung was his supervisor's outer office, which was public area not shown to be segregated for private purposes from other work areas.

xii) Camara v. Municipal Court (1967), 387 U.S. 523:

5. When right of privacy must reasonably yield to right of search is, as a rule to be decided by judicial officer, not by policeman or government enforcement agency. U.S.C.A. Const. Amend. 4.

7. In determining whether public interest demands creation of general exception to warrant requirement of

Fourth Amendment, question is not whether public interest justifies type of search in question, but whether authority to search should be evidenced by court, which in turn depends in part upon whether burden of obtaining warrant is likely to frustrate governmental purpose behind search.

8. . . . Searches, when authorized and conducted without warrant procedure, lack traditional safeguards which Fourth Amendment guarantees to individuals; overruling FRANK v. State of Maryland, 359 US 360, 79 SCt 804, to extent that it sanctioned warrantless inspections. U.S.C.A. Const. Amend. 4.

10. In case in which Fourth Amendment requires that search warrant be obtained, probable cause is standard by which particular decision to search is tested against constitutional mandate of reasonableness. U.S.C.A. Const. Amend. 4.

14. Search warrant procedure is designed to guarantee that decision to search private property is justified by reasonable government interest, but reasonableness is ultimate standard, and if valid public interest justifies intrusion contemplated, there is probable cause to issue SUITABLY RESTRICTED search warrant. (Emphasis added.)

[10] . . . To apply this standard, it is obviously necessary first to

focus upon the government interest which allegedly justifies intrusion upon the constitutionally protected.

When the justification changes from search for forged documents to securing government property (training computer was claimed to be donated without being processed) to collecting training records (kept outside locked office) to sorting private papers from public documents (and then packing everything in the locked office and storing them for future search of instruments to intimidate a witness against the state with her professional photograph and personal correspondence), allegations do not try to justify but attempt to excuse misconduct.

xiii) Allen v. City of Marietta (N.D. Ga. 1985) 601 F. Supp. 482:

> "This is not the case when an office supervisor or fellow employee is looking for some needed document or record and inadvertently happens

> upon incriminating evidence in the desk or wastepaper basket of another employee. Nor is it a situation where a supervisor is inspecting the area used by a subordinate in order to examine his work or to evaluate his performance on the job."

Chief petitioner, whom Dr. Ortega trained, is his nominal supervisor, had never evaluated his performance, and had been accused of "rubber-stamping" whatever he is given. Dr. Ortega, on the other hand, kept getting meritorious salary increases annually for 17 years without a single grievance against him.

No employee should be investigated by a fellow employee (co-petitioner Friday) against whom he had lodged a grievance (also the first time in 17 years). The right to an impartial decision-making process, unbiased by biased reports, is required by due process.

Permanent employees have property rights to their tenured position and

statutory expectancy that they will not be removed other than for "such cause as will promote the efficiency of the service".

> "Employment is one of the greatest, if not the greatest, benefit that governments offer in modern day life" Roth, 408 U.S. at 589, 92 SCt at 2715.

Dismissal from public employment for cause may also implicate liberty interests in imposing on the discharged employee a stigma of incompetence or wrongdoing that forecloses "his freedom to take advantage of other employment opportunities". Id at 573, 2702.

For the hearing to be meaningful (as distinguished from being conducted fairly, which appended "Nature of Controversy" clearly controvert), the decision-maker must be independent and unbiased.

"6. A government employee's supervis-

> ors might legitimately search her desk or her locker or her jacket where purpose of such is not to gather evidence of a crime unrelated to the employee's performance of her duties but is, rather, undertaken for the proprietary purpose of preventing future damage to the agency's ability to discharge effectively its statutory responsibility and employee cannot claim legitimate expectation of privacy from searches of that nature. . .
>
> IIIB. In government employment, such exceptions involve "a balancing of the individual's expectation of privacy against the government's right as an employer (as opposed to the government's right as a law enforcer) to investigate employee's misconduct which is DIRECTLY relevant to the employer's performance of his duties and the government's performance of its statutory responsibilities. (Emphasis added.)

Petitioners' claim that the "three personal items involving a female medical resident (Dr. Onne, a. 1) were removed as relevant to the pending personnel investigation against the respondent (Dr. Ortega)" was given the lie by their own state counsel who

offered, in defense of incomplete discovery [II:3/10], that he (Mr. Rubin) "volunteered to present to Dr. Ortega some additional materials which have become relevant, only as a result of the first hearing, when he handed me some statement of a former staff member of the hospital" (Dr. Sutton).

xiv) U.S. v. Kahan, 350 F.Supp. 784 (S.D.N.Y. 1972, rev'd 415 US 239, 94 SCt 1179), 39 L.Ed.2d 297 (1974):

> Even an employee's wastebasket is protected by the Fourth Amendment if the "criminal investigator's express purpose in rummaging through the wastepaper basket was to obtain evidence which could be used to prove the defendant guilty of a crime". Id. at 791. (Cf. r. 17 and [II:167/20 - 171/7].)

5. When a government supervisor begins an investigation of suspected criminal activities by an employee in course of his work, supervisor's role is no longer that of a manager of an office, but that of a criminal investigator for Government, in that purpose of surveillance is no longer simply to preserve efficiency in office but is specifically designed to prepare a criminal prosecution

against employee, and, in that case, searches and seizures by supervisor or by other government agents are governed by Fourth Amendment admonition that a warrant be obtained in absence of exigent circumstances.

12. Both direct and third party consent may justify searches which would otherwise be extremely unreasonable, either because they are conducted on mere suspicion or less or because they are extensive and exploratory in nature. U.S.C.A. Const. Amend. 4.

14. The only exception to the warrant request should be for searches and seizures which are reasonable because they are the result of exigent circumstances which compel a government agent to act swiftly and which makes their application for a warrant not reasonably practicable.

Petitioners were refused a court order to take back the computer to the hospital, but could have obtained a search warrant for respondent's office, if they suspected Dr. Ortega of criminal wrongdoing because he took the computer. Or they could have asked him for the training records they claimed they

wanted to secure against loss. App212.

15. Once it is determined that claimant has been subjected to a search or seizure which intruded on privacy which he could reasonably expect under circumstances, Government should be made to prove either that a valid warrant was obtained prior thereto or that exigent circumstances necessitated proceeding without a warrant. U.S.C.A. Const. Amend. 4.

16. Government employees have as much reason as private employees to expect that their desks and their wastebaskets will be free from invasion by criminal investigators of Government. U.S.C.A. Const. Amend. 4.

20. Concept of privacy is paramount in deciding a claimant's standing to invoke protection of Fourth Amendment.

21. Decisions of Supreme Court that . . . public emplyees are entitled, like all other persons, to benefit of the Fifth Amendment privilege against self-incrimination imply, if they do not mandate . . . that a public employee retains shield of Fourth Amendment while employed in government office. U.S.C.A. Const. Amend. 4,5.

26. When an area in a government office is reserved for exclusive use of a particular employee, that

employee necessarily has a sufficient expectation of privacy in that area, whether it be a desk or wastebasket, or that third party consent to a search by a criminal investigator will be ineffective to bar employee's Fourth Amendment claim in a subsequent prosecution.

30. Where indisputable expectation of employee was that papers will be subsequently disposed of and destroyed without prior inspection by others, wastebasket was not "abandoned by employee when he left his office . . . so long as he remained an employee with an assigned desk under which lay a wastebasket for his exclusive use and employees had standing to challenge legality of warrantless search made of his wastebasket by government agent.

31. Warrantless search made by government agent . . . could not be justified on ground that articles in basket were thrown away and were government property. U.S.C.A. Const. Amend. 4.

32. . . . When there was no special emergency situation nor any exigent circumstances . . . Government could simply have detained waste basket before it was emptied so as to provide enough time to get a warrant.

33. Right of government employees to privacy in a limited area of his office which is devoted to his

exclusive use must be protected from intrusions by investigative and prosecutory arms of Government. U.S.C.A. Const. Amend. 4.

34. (Above) do not affect ability of supervisors in government office to search desk or wastebasket of an employee for official documents which are lost, missing, or needed for business of office . . .

xv) See v. City of Seattle (1967) 387 U.S. 541: Administrative Law and Procedure:

While demand to inspect may be issued by administrative agency in form of subpoena, it may not be made and enforced by inspector in field and subpoenaed party may obtain judicial review of reasonableness of demand prior to suffering penalties for refusing to comply.

9. Basic component of reasonable search under Fourth Amendment is that it not be imposed without suitable warrant procedure.

Unreasonable searches are not warranted. Reasonable searches need a warrant.

xvi) New Jersey v. T.L.O. (1985) 105 S.Ct. 733.83 L.Ed.2d 720:

6. Determining reasonableness of any search involves a two-fold inquiry as to whether action was justified

at its inception and whether search as actually conducted was reasonably related in scope to circumstances which justified interference in the first place.

xvii) U.S.v. Jacobsen (1984) 104 S.Ct. 1652, 80 L.Ed.2d 85:

4) Letters and other sealed packages (e.g. locked desk drawers) are in the general class of effects in which the public at large has a legitimate expectation of privacy and warrantless search of such effects are presumptively unreasonable.

5. Seizure of sealed package may be . . . to prevent destruction of contraband, but a warrant must be obtained "before examining contents of such a package". U.S.C.A. Const. Amend. 4.

11. It is constitutionally reasonable for law enforcement officials to seize with a warrant "effects"that cannot support a justifiable expectation of privacy, based on probable cause to believe they contain contraband.

xviii) Shaffer v. Field, 339 F.Supp. 997 (C.D. Cal. 1972), aff'd 484 F.2D 1196 (CA9 1973):

6. Criteria considered in determining whether warrantless and unconsented to search of locker of petitioner, a former deputy sheriff, was constitutionally justifiable included the

nature of the charge against petitioner (murder), the object of the search (a gun) and whether there existed any regulation or practice which should have put petitioner on reasonable notice that his locker could have been examined by others (three times) without his consent. U.S.C.A. Const. Amend. 4.

xix) Wyman v. Jeames (1971) 400 U.S. 309:

Welfare recipient received notice of visit several days before arrival of non-uniformed "intruder".

xx) Oliver v. U.S. (1984) 104 S.Ct. 1735, 80 L.Ed.2d 214:

6. Open fields (of grain or marijuana) do not provide the setting for those intimate activities that the Fourth Amendment is intended to shelter from government interference or surveillance. U.S.C.A. Const. Amend. 4.

7. . . (B)ecause open fields are accessible . . . in ways that a home, office or commercial structure would not be, asserted expectation of privacy in open fields is not one that society recognizes as reasonable.

8. Common law imply . . . that only the land immediately surrounding and associated with the home warrants Fourth Amendment protection that

attaches to the home.

If the hospital is home to the state, petitioners should have charged Dr. Ortega with breaking and entering!

xxi) Davis v. Scherer (1984) 104 S.Ct. 3012:

4. Even defendants who violate constitutional rights enjoy qualified immunity that protects them from liability for damages unless it is further demonstrated that their conduct was unreasonable under the applicable standard. 42 U.S.C.A. Sec. 1983, U.S.C.A. Const. Amend. 4.

7) . . . If statute or regulation does give rise to cause of action for damages, clear violation of the statute or regulation forfeits immunity only with respect to damages cause by that violation. 42 U.S.C.A. 1983, U.S.C.A. Const. Amend. 4.

xxii) Parratt v. Taylor (1981) 451 U.S. 527:

2. In any section 1983 action initial inquiry must focus on whether two essential elements are present: whether conduct complained of was conducted by person acting under color of state law; and whether this conduct deprived person of rights, privileges or immunities secured by Constitution as laws of the United States. 42 U.S.C.A. Sec. 1983.

3. Some kind of hearing is required at some time before state finally deprives person of his property interests.

4. Fundamental requirement of due process is opportunity to be heard, and it is an opportunity which must be granted at meaningful time and in meaningful manner.

Dr. Ortega did not get even a Skelly hearing after union withdrew legal assistance under pressure from chief petitioner who was also on state bargaining team (Cf. Argument "2-h"). (Skelly was a Caucasian who imbibed and had had one suspension from the medical staff of his hospital.)

xxiii) Paul v. Davis (1976) 424 U.S. 693:

3. The procedural questions of the Fourteenth Amendment apply whenever the state seeks to remove or significantly alter interests comprehended within meaning of either "liberty" or "property".

7. While no "right of privacy" is found in . . . the Constitution, "zone of privacy" may be created by more specific . . . guarantees and

thereby impose limits upon government power. U.S.C.A. Const. Amend. 1,4,5,9,14.

This is technical base for Argument Three about the right to be let alone.

xxiv) Perry v. Sindermann (1972) 408 U.S. 593:

6. A persons' interest in a governmental benefit is a "property interest" subject to procedural due process protection if claim of entitlement to the benefit is supported by rules of the agency affirming the benefit or by mutually expedient understanding. U.S.C.A. Const. Amend. 14.

S.P.B. refused to issue any subpoenas.

xxv) Pickering v. Board of Education (1968) 391 U.S. 563:

3. Where State Court, in action by dismissed teacher against board of education seeking reinstatement, at no time gave de novo consideration to statements contained in teacher's letter, which constituted basis for teacher's dismissal, Supreme Court was free to examine evidence in case completely independently, and to afford little weight to factual determination made by board of education.

S.P.B. decision on March 8, 1981 did

not have the benefit of finished transcripts of the hearings, but rehearing was denied.

xxvi) Carey v. Piphus (1978) 435 U.S. 247:

6. Denial of procedural due process should be actionable for nominal damages without proof of actual injury. 42 U.S.C.A. Sec. 1983, U.S.C.A. Const. Amend. 14.

Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty.

The cardinal priniciple of damages in Anglo-American law is that of "COMPENSATION for the injury caused to plaintiff by defendant's breach of duty". 2 F. Harper and F. Jones, Law of Torts, Sec. 25.1, p. 1299 (1956) (emphasis in original).

xxvii) Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971):

". . . The question then, is . . . whether compensatory relief is

"necessary" or "appropriate" to the vindication of the interest asserted. . . Damages as a traditional form of compensation for invasion of a legally protected interest may be entirely appropriate even if no substantial deterrent effects in future official lawlessness might be thought to result. . ."

xxviii) Mt. Healthy City Board of Ed. v. Doyle (1977) 429 U.S. 274:

1) Entitlement to more than $10,000 in damages confer . . . (federal) jurisdiction . . . 28 USCA Sec. 1331, USCA 1,14.

xxix) Terry v. Ohio (1968) 392 U.S. 1:

6. . . . Courts will not be made party to lawless(ness) . . . by permitting unhindered governmental use of fruits (there)of. . .

13) Scope of search must be strictly tied to and justified by circumstances which rendered its initiation permissible.

14) . . . (F)acts must be judged against objective standard of whether facts available to officer at moment of seizure or search would (mean) to man of reason . . . that action taken was appropriate.

28. Fourth Amendment proceeds as much by limitations upon scope of governmental action as by imposing

preconditions upon its initiation.

xxx) Monroe v. Pape (1961) 365 U.S. 167:

2. Allegations of facts constituting a deprivation . . . satisfy requirements of statute making any person who, under color of state statute, ordinance, etc., deprives any citizen of his constitutional rights liable to party injured. U.S.C.A. 4,14,42 U.S.C.A. Sec. 1983.

5) One reason for passage of federal statute . . .was to afford a federal right in federal courts where, because of passion, prejudice, neglect, intolerance or otherwise, state laws might not be enforced and claim of citizen to enjoyment of rights, privileges, and immunity guaranteed by the Fourteenth Amendment might be denied by state agencies. 42 U.S.C.A. Const. Amend. 14.

6) . . . (F)ederal remedy is supplementary to the state, and state remedy, if any, need not be first sought and refused before federal one is invoked. 42 U.S.C.A. Sec. 1983.

RESPONDENT'S PRECEDENTS IN OPPOSITION:

1) In U.S. v. Hagarty (7th Cir. 1968) 388 F2d 713, the Court held that the Fourth Amendment protected conversations in a closed office, because the Fourth Amendment applies wherever a person conducts activity with an objectively reasonable expecta-

tion of constitutional protection from search and seizure. The state had argued (as do California and the U.S. Department of Justice) that:

"(T)he fourth amendment does not apply to the search of governmental premises in the course of an investigation relating to the conduct of governmental business."

The court rejected this argument and found that the search by the investigators was "part of an effort to secure evidence of crime" and was therefore the kind of search prohibited by the fourth amendment. Id. at 717. If amateur investigators can be believed under oath (II:168 et. seq.), so was their "administrative inventory" a search for forgery!

For the last 17 years since HAGARTY, there had only been one case cited by petitioners (PB 11: r. 37-40!) where the state is at risk

for doing its job of oversight. Can we really afford to sleep on the job of schooling our overseers who were asleep during their elementary civics class on the Bill of Rights? P.B. 24.

2) In Mapp v. Ohio (1961) 367 U.S. 643, the United States Supreme Court held that the purpose of the Fourth Amendment exclusionary rule was to deter violations of the privacy of citizens by police officers.

3) In People v. Superior Ct. (Tyler) (1981) 115 Cal.App.3d 557, 171 Cal.Rptr. 448, the court held that the defendant had reasonable expectation of privacy in his suitcase located in his automobile.

4) In U.S. v. Hitchcock, 467 F.2d 1107, 1108 (9th Cir. 1972), the Court found that a warrantless search of a prison cell does not violate the Fourth Amendment, since "it is obvious that a jail shares none of the privacy of a home, an automobile, AN OFFICE, or a hotel room. In prison, official surveillance has traditionally been the order of the day.

5) In U.S. v. Speights (3rd Cir. 1977) 557 F2d 362, the Court found the police officer's locked locker at

headquarters was protected by the Fourth Amendment from warrantless search by superiors.

Most of the exceptions to the warrant requirement involve some sort of exigent circumstances such as an immediate danger to the police officers or to the community [see, e.g, TERRY v. Ohio (1968) 392 US 1, 88 SCt 1868, 20 LEd2d 889], or the risk that the evidence could vanish or be destroyed while a warrant is being obtained. [Cf. SCHMERBER v. California (1966) 384 US 757, 86 SCt 1826, 16 LEd2d 908.]

6) In U.S. v. Blok (D.C. Cir. 1951) 188 F2d 1091), the District of Columbia police had searched her desk without a warrant for evidence of petty larceny:

> "We think appellees exclusive right to use the desk assigned to her made the search of it unreasonable. . . Her official supervisors might reasonably have searched the desk for official property needed for official use. . . In absence of a valid regulation to the contrary, appellee was entitled to, and did, keep private property of a

personal sort in her desk. Her supervisors could not reasonably search the desk for her purse, her personal letters, or anything else that did not belong to the government and had no connection with the work of the office. Their consent did not make such a search by the police reasonable. Operation of a government agency and enforcement of criminal law do not amalgamate to give a right of search beyond the scope of either."

7) In Coolidge v. New Hampshire, 403 U.S. (1971) 443, 454-55, 91 SCt 2022, 2031-32, 29 LED 564), the Supreme Court has held that warrantless searches

"are per se unreasonable under the fourth amendment -- subject only to a few specifically established and well-delineated exceptions".

8) Screws v. U.S., 325 U.S. 91, 65 S.Ct. 10312 requires a finding of specific intent in order to sustain a conviction under the cognate penal provisions of 18 U.S.C. Sec 242, 18 U.S.C.A. Sec 242:

"an intent to deprive a person of a right which has been made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them. 32 U.S. at 104, 65 S.Ct. at 1037.

The word "willfully" in 18 U.S.C. Sec. 242, 12 U.S.C.A. Sec. 242, from which

the requirement of intent was derived in SCREWS does not appear in Sec. 1979. Sec. 1979, by the very fact that it is a civil provision, invites treatment different from that to be given its criminal analogue. The constitutional scruples concerning vagueness which were deemed to compel the SCREWS constraint have less force in the context of a civil proceeding, and 1979, insofar as it creates an action for damages, must be read in light of the familiar basis of tort liability that a man is responsible for the natural consequences of his acts.

The SCREWS opinion itself concedes:

> "The fact that the defendant may not have been thinking in constitutional terms is not material where their aim is not to enforce local law but to deprive a citizen of a right and that right was protected by the Constitution. 315 U.S. at 106, 65 S.Ct. at 1037.

9) Baltimore and Ohio R. Co. v. Groeger, 26 U.S. 521: Civil liability has always been drawn from such indefinite standards as reasonable care. a man of ordinary prudence, forseeability, etc.

10) Bell v. Hand, 327 US. at 84, 66 S.Ct. at 777:

> "(I)t is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such an invasion, federal courts may used ANY available remedy to make good the wrong done." (Emphasis added.)

11) Ward v. Strickland, 420 U.S. at 319, 95 S.Ct. at 999:

> Damages are available under Section 1983 for actions "found to have been violative . . . of constitutional rights and to have caused compensable injury.

In deciding on the damages, the substance of the violation must be considered:

A: the importance of the particular interest violated;

B: the extent of deviation from

lawful conduct;

C: the extent to which the violation was willful;

E: the extent to which privacy was invaded; and

F: whether the things seized would have been discovered.

Although discovery procedures encourage "fishing expeditions" that are prohibited by search and seizure laws, Dr. Sutton's ten-year-old souvenirs would not have been within reach, whether she was a former staff member of the hospital, or a former medical resident under her married name ten years before.

IN FINE, the constitutional question is whether (a) an administrative investigation is (b) an invitation to snoop (c) after sending the peon away (d) from his associates (e) on "vacation" without pay in order to (f) look into his private files (g) for evidence (h) to blackmail him or his with or (i) dismiss him on any charge and (j) make him appeal without hope of redress (k) to exhaust his savings if he refuses to resign, (l) harass his supporters with souvenirs and (m) ruin his reputation, if (n) they can but get away with it (o) scot-free.

OR, whether it is NOT a violation of a government employee's civilian (private or human) rights under the FIRST (peacably to assemble and petition for redress), FOURTH (to be secure in their persons, houses, papers, and effects), FIFTH (not to be witness against himself or be deprived of liberty or property without due process or just compensation), SIXTH (to a speedy and public trial and to be confronted with witnesses and to obtain his own), SEVENTH (to a jury trial according to the rules of common law), EIGHTH (not to be fined or punished excessively), NINTH (not to lose any rights retained by the people), TENTH (to reserve what rights have been retained by referendum with the 1972 Amendment to the State Constitution to guarantee privacy to its people in state

institutions or at home), and the FOURTEENTH Amendments (protecting persons as well as citizens) arbitrarily to place him on administrative leave in order to make a secret, if abortive, inventory of his personal papers and professional correspondence in a government office assigned BUT denied to him while he is undergoing an internal investigation of his management practices and to impound everything in it during his appeal against dismissal while denying him the right to subpoena and confront his accusers or their supporters or to testify in a public hearing so that his testimony will not be heard and can be shared only between the hearing officer and opposing counsel who added the charge of coercion that their witnesses denied under oath.

FROM RECORD OF FEDERAL PROCEEDINGS

Below are what were once designated for inclusion in the Joint Appendix, which did not get served in time.

1) Motion for Summary Judgment or Order Specifying Facts, March 12, 1984; Statement of Facts in Support, and Memorandum of Authorities, March 13, 1984; and Opposition to Motion for Summary Judgment, March 26, 1984, in Case No. 82-4045;

2) Appellant's reply brief, January 22, 1985 in Case No. 84-2169, Ortega v. O'Conor (in addition to Respondent's Reply to Petition for Certiorari, Case No. 85-830);

3) Excerpts of the rest that was submitted and cited in Request for Judicial Notice in present petitioners' Motion for Summary Judgment to District Court, March 14, 1984.

[Below are parts thereof, the rest in accompanying Appendix under Rule 30.6.]

Dr. O'CONNOR's Deposition,
Apr. 27, 1983, Page 18:

> Q: Now what specifically were the reasons supporting your conclusion that you were justified in putting Dr. Ortega on administrative leave when you did so in August of 1981?
>
> A: Specifically they revolved essentially around concerns of what my hospital administrator (Mr. Friday) felt were violations of contractual procedures, had to do with the obtaining a computer by means which seemed to be cloudy at best, at that time, had to do with an allegation by one of the doctor's supervisees (Dr. Vaughn) that the residents had [been] coerced to provide donations to purchase a computer which I thought had been donated by a company. . .

[Coercion is easily established, but cannot be proved by paper search, which makes seizure of all office contents unwarranted. Dr. Vaughn was never invited to contribute, and coercion can be investigated by simply talking to contributors. After doing so, no charge

of coercion was included in Notice of Punitive Action.]

Page 51, Dr. O'CONNOR's deposition:

Q: In other words, that the State has the authority to go in and look through all of the person's belongings to see whether they are public property or personal property; is that what you are saying?
A: Yes.

Q: But in fact, some of the personal items were used in the hearing against Dr. Ortega; isn't that correct?
A: Yes.

Page 60, Dr. O'CONNOR's deposition:

Q: Had this practice of going into doctors' offices have ever been done at Napa State Hospital?
A: I recall an instance in which we found in an office -- Well, I amnot sure exactly, but there was an episode where we found information in an office that led us to believe that there were reasons for adverse action.

[After Dr. Ortega was dismissed, a love letter by a patient to a member of the nursing staff was used to dismiss him.]

Q: So, you have gone into somebody's office in another oc-

casion without their permission?

A: I don't recall whether or not we had the permission. I don't know if the person was there or not. This was five or six years ago.

Q: Is it any part of the hospital's rules, regulations that an employee cannot have personal property or belongings in his or her office.

A: There is no rule against that.

Page 61, Dr. O'CONNOR's deposition:

Q: Were there any files relating to private patients that were discovered in Dr. Ortega's office so far as you know?

A: I believe there was, yes.

Q: Do you know if anybody entered or reviewed the contents of those files?

A: My only recollection of what it was was some billings or something like that and we had wondered whether or not he performed certain duties of private practice on State Hospital time, but we did not pursue that.

Q: You're talking about (M)edi-(C)al billings?

A: I think so, yes.

Q: Somebody viewed those files, and whether they constituted improper billing --

A: We thought there might be

that Dr. Ortega was using his office or State time to conduct other than what his job as Chief of Professional Education was, but again, there was no evidence to pursue that and that was not part of his punitive action. (Cf. Exx. L and xxi.)

Q: Did you see the contents of these particular patients relating to the outside?

A: I vaguely recall seeing a bill regarding something (M)edi-(C)al, but I didn't pursue it.

Q: Do you know if anybody did pursue it?

A: I don't think so, not to my knowledge . . .

Page 73, Dr. O'CONNOR's deposition:

Q: What's the answer to the question, though? Is it the contention of the hospital that the State or the hospital has the right to review and look at any employee's personal property which is not State property without that employee's permission?

A: Well, it would be my position basically that under certain circumstances, the State would have the right to enter a State office and to make a determination as to what is State and what is not the State's. In fact, that's what happened in this case.

[Thus, the investigation was only the cover for the resolve to get rid of Dr. Ortega and all his belongings as soon as possible, even pack them for him.]

Mr. FRIDAY's Deposition,
June 28, 1983, Page 40:

Q: In other words, the practice, what we've just been talking about, is there any other such practice that's been employed in State hospitals in California?

A: To what?

Q: To have management enter an employee's room without their permission and sort through their personal goods, and sort them out from the State property?

A: At least, let me say my practice is to - -

Q: This is your personal practice?

A: This is my personal practice as hospital administrator, is not to inspect if it's identified as somebody's personal things, not to go through it. If there was a knapsack sitting there -- we have social workers, for example that carry around knapsacks. That I would not go through that. That, I would consider personal. But the practice is to go through what is considered a bona fide business activity that the employee is hired

to carry out for the state.

Q: This policy that you yourself have, that's not in writing anywhere, is it?
A: No, but it's the policy I tell my people.

Page 26, Mr. Friday's deposition:

Q: Did you use this special key to his office to enter?
A: That's correct.

Q: It was just one key, or were duplicates made?
A: No, just one key.

Q: In relation to the date that Dr. Ortega was placed on administrative leave, August 17, approximately when did you enter his office?
A: I'd say probably within five or six days, something to that effect.

Q: Was it during a regular work day?
A: No, it wasn't.

Q: In an evening?
A: It was an evening.

Q: Was anyone else present at the time?
A: No.

Q: Was anyone else present even in the entire department when you went in?

A: No.

Q: My purpose was to make sure that the work was proceeding in terms of boxing items up, separating things, and so forth.

[Dr. Ortega was to be sent "packing".]

Page 33, Mr. FRIDAY's deposition:

Q: Who gave it back to you?
A: I had the key. No one gave it back to me. . .

Q: You had basically control and custody of the key?
A: That's right.

Page 39, Mr. FRIDAY's deposition:

Q: So far as you know, Dr. Ortega was never given a key to the new lock, was he?
A: No, he never asked for one.

Q: Would you have given him one if he asked for one?
A: No.

Q: So, in fact, he could not enter his office, right?
A: That's right.

Q: Did you know of any other instances in Napa State Hospital when an employee was locked out of their office and could not reenter?
A: Not at Napa, but at other hospitals.

[What was so precious about state papers that the occupant might not leave behind for officers to enjoy?]

Mr. STRATTON's Deposition, December 1, 1983, Page 46:

Q: Have you personally been involved in any other situations like this when an employee's office was entered and the locks changed.
A: Me, personally, no.

Q: But you have heard of other occasions in which this has been done.
A: That is possible.

Q: What do you mean it is possible? Do you recall?
A: I don't recall. I might have heard it, but I don't recall hearing it.

Page 7, Mr. STRATTON's deposition:

Q: Okay. Now, you didn't find any log or summary of what was taken from his office?
A: No, sir, I removed the stuff myself, and I did not make a log or summary of it.

Q: You didn't make notes or anything?
A: No, I did not.

Q: Did you start to make notes?

A: At the beginning, I started to, then it was superfluous, and I threw everything away and boxed it all up.

[That was the objective all the time.]

Q: What do you mean it was superfluous?

A. There was so much stuff. Trying to sort State from non-State, it was too much to do, so I gave it up and boxed it up.

[The investigators were such amateurs, they cannot inventory what they seize.]

Page 8, Mr. STRATTON's deposition:

Q: How many pages had you written before you threw it away?

A: Maybe two sentences.

. . .

Q: And did you ask anyone else who is your superior whether that was okey to no longer log them?

A: No, I did not.

Q: You just decided that on your own?

A: That's correct. Well, I did talk to Mr. Friday and told him it was a difficult task and that I would not make a log, and so I did not.

[Their primary excuse had no priority!]

Q: And he said that was all right?
A: Yes.

Q: Do you know if anybody else made a log of these contents?
A: Nobody else did, to my knowledge.

[Need to do an inventory was invented.]

Page 41, Mr. STRATTON's deposition:

Q: . . . (Mr. Friday) just said Dr. Ortega is on administrative leave and said search his office?
A: He didn't tellme to search his office; he told me to go down and remove his stuff, sort it out.

[That sequence was much more accurate.]

Q: Did he tell you to look for anything in particular?
A: Only to separate out between State and personal property.

[Before separating Dr. Ortega himself.]

Page 47, Mr. STRATTON's deposition:

Q: So far as you know, was it standard practice then at the hospital when someone is terminated, an employee, to immediately change their locks?
A: Maybe not in every instance, but yes.

Q: Was it also the policy of the hospital to go into their

possessions and sort out personal things from State things?
A: To my knowledge, yes.

Q: Because you had been involved in some similar kinds of situations of other employees who had been terminated?
A: Yes.

[The inventory was not investigatory!]

Page 60, Mr. STRATTON's deposition:

Q: Now, the boxes were taken out of Dr. Ortega's office and taken over to your office?
A: That is correct.

Q: And they were later taken to another evidence locker?
A: Yes, that's correct.

. . .
Q: And who instructed you to do that?
A. I think I asked Mr. Friday if I could do that to get them out of my office.

. . .
Q: When you saw this picture of Dr. Sutton, what did you do with it at that time?
A: I handed it to Dr. Laskay.

. . .
Q: Was there a Valentine with it? In fact, wasn't there a whole file under Dr. Sutton's name?
A: I don't remember if it was

or not. I remember it was in a desk drawer.

[Why was her photograph handed around?]

SUPPLEMENTAL DECLARATION BY M. J. ORTEGA
March 26, 1984

"2. During the hearings before the State Personnel Board . . . I raised the issue of the illegality of the search and seizure of my office, and the seizure of my personal goods and belongings, as well as their used against me in evidence. I contended that said break-in and seizure was a violation of my Constitutional rights under the Fourth Amendment and an invasion of privacy.

"3. . . . (T)he State of California was well aware that I was making these allegations of illegality in violation of my Constitutional and statutory rights. . ."

"s/M.J.O.

They were broached on the FIRST DAY of the hearing:

I: 4/11 - 6/16 (r. 16, 20, 24, 23, 26, 52):

G.C. 19574.5, Skelly, discovery, invasion of privacy, illegal seizure, expropriatio, second use of information:

Dr. Ortega: Can I ask if the State can deprive me of one thousand dollars on the basis of hearsay . . .?

Hearing Officer: Hearsay evidence is admissible in an administrative hearing. . .

Q: Okay. Do the pre-removal safeguard . . . guaranted all permanent employees include not only notice . . . but also of the materials upon which the decision is based so that the right to respond is not just an empty promise?

A: . . . If they didn't, it would merely postpone the effective date of any action taken thereunder. . .

Q: Am I entitled to see the evidence that made the State start an investigation?

A: . . . It's going to be covered in evidence when witnesses are actually called(!)

Q: Can the State search my personal belongings without my permission?

A: . . . We'd have to hear the evidence in the case before we could make a ruling on that type of issue.

Q: In the meantime, before that ruling is made, can we suppress the evidence that may have come from such a search?

Hearing Officer: We never suppress evidence in an administrative hearing. That's strictly in

criminal courts.]

UNTIMELY SUBMISSIONS TO FEDERAL COURT BY ATTORNEY GENERAL

"April 9, 1984

"Dear Judge Vukasin:

"On March 28, 1984 you granted the motion for summary judgment . . . Prior to my drafting a proposed order per your instructions I wish to provide the court with (Mr. James Stratton's) depositions corrections which are relevant to the court's determination.

"These corrections are based upon the fact that Mr. Stratton's testimony, THOUGH CORRECT WHEN GIVEN, is no longer accurate given new information which he received. . .

"Mr. Stratton's corrections are based upon his post-deposition review of a document which may not previously have been provided to (Dr. Ortega) and the existence of which may not have been disclosed.

[It was required to be furnished to Dr. Ortega by State Superior Court Order on November 2, 1981, granting discovery of all "investigative notes", Exhibit H: 2) That (Dr. Ortega) be furnished any

statements taken relating to persons IN CONNECTION WITH THE INVESTIGATION.]

> "I received a copy of the document to which the deposition corrections make reference on April 5, 1984 and I have enclosed it for your review. The State claims that this document is privileged as is more fully set forth below. This document is a PRELIMINARY INTERNAL INVESTIGATIVE REPORT which consists of the notes, impressions and reflections of Dr. Laskay relative to the interviews he conducted with individuals at Napa State Hospital regarding the performance of Dr. Ortega. . .

[In fact, the notes include statements made by people out of state who were contacted by telephone, from numbers taken from triple-locked private papers in a drawer of a desk in an office.]

> "Attached to the report are copies of documents he apparently utilized in his investigation. [Dr. Laskay is deceased so it is not possible to question him about these duplicates.] . . ."
>
> "s/Nancy S. Wainwright, Deputy Attorney General

[Dr. Ortega kept waiting for a Court

Order to have these duplicates surrendered to him, and would not accept what they have been copied from unless all copies were also tendered. (They must be surrendered by court order to respondent/owner of originals.) State attorneys insinuated that Dr. Ortega could not have been interested in his memorabilia. (Why would he have kept them all these years?) From careless packing, many of them are torn beyond repair.]

From Dr. Ortega's attorney:

April 12, 1984

Dear Judge Vukasin:

I was shocked and outraged to receive today . . . nearly total and complete changes to the deposition of Officer Stratton.

There has been no showing, nor even any attempted showing, why this information could not have been submitted in the regular course of the cross-motions for summary judgment.

The revision of Officer Stratton's deposition is not a revision, but a total reversal of his testimony. . . I ask that it (the opposite version) be stricken.

Furthermore, the conclusion is inescapable that defendants believe that they have inadequate bases or grounds for the . . . summary judgment, and are attempting to correct and revise the record after the fact.

[The courtroom audience agreed with Dr. Ortega's counsel, and so did the Court of Appeals.]

It was specifically represented to me that all such documents had been disclosed. This alone is sufficient grounds on which to strike the submission. . .

There is no authority for an attorney in litigation to submit a document ex part to the judge hearing the case, without benefit of court order or motion procedure. . .

Therefore, I ask for an Order compelling the defendants to immediately disclose and produce the entire document (to Dr. Ortega), and for sanctions as attorney's fees for failure to produce said documents according to the duly-noticed request for production of documents. . .

From AMENDED PETITION
FOR WRIT OF MANDATE,
Case No. 44526 (r.29)

IN THE SUPERIOR COURT OF
THE STATE OF CALIFORNIA IN
AND FOR THE COUNTY OF NAPA

Dated: 1 April 1985

FIVE. (Dr. Ortega's) Right to a Fair Hearing was Violated by the Secret Non-Disclosure by Defendants of Available Evidence Relating to the Charges Against (Dr. Ortega).

As indicated in the supporting Declaration attached hereto, some two years after the hearings herein, the Deputy Attorney General . . . in a Federal Court case revealed that there was an undisclosed document consisting of a "preliminary internal investigative report", consisting of the notes, impressions and reflections of Dr. Laskay, one of the members of the investigative team, relative to the interviews he conducted with individuals at Napa State Hospital regarding the performance of Dr. Ortega. The utilization of this document (by Dr. Ortega) may very well have altered the outcome of the administrative hearing, had he had access to it. In the State Personnel Board hearing below, the respondents refused to properly comply with discovery, necessitating (Dr. Ortega) obtaining an order from the Napa County Superior Court ordering . . . to comply with discovery. In addition, Skelly v. State Personnel Board (1975) 15 Cal.3d 194, 215, held that

"due process" does mandate that the employee be accorded certain procedural rights BEFORE discipline becomes effective. As a minimum, these pre-removal safeguards must include notice of the proposed action, the reasons therefor, A COPY OF THE CHARGES AND MATERIALS UPON WHICH THEIR ACTION IS BASED, and the right to respond, either orally or in writing, to the authority (Dr. O'Connor) initially imposing discipline" (emphasis added). In this case, it is clear that petitioner was not allowed to review the "materials upon which the action is based", which under SKELLY was required to be given to him prior to the initial taking of punitive action. This violation alone is sufficient to reverse the Personnel Board decision, on the grounds that petitioner did not have a fair hearing.

DECLARATION IN SUPPORT OF AMENDED MANDAMUS PETITION:

2. I am also the plaintiff in a Federal suit . . . currently on appeal before the Ninth Circuit.

3. Private patient files and billings were examined according to defendant O'Connor's deposition, in violation of G.C. Sec. 6254(c), and field investigation of fraud in disregard of G.C. Sec. 11180.5 ended with dire threats. Exhibit L.

4. On April 9, 1984, after

substantial and lengthy discovery had been undertaken by the parties, and after defendants' Motion for Summary Judgment had already been argued and decided, the Attorney General's Office, on behalf of defendants, informed the Court of the existence of a preliminary investigative report which had not previously been provided to plaintiff, either in the District Court suit or in petitioner's previous hearing before the State Personnel Board.

5. The attorney sent a copy to the District Court Judge, claiming that it was privileged, and describing it as a "preliminary internal investigative report which consists of the notes, impressions and reflections of Dr. Laskay (one of the members of the team investigating petitioner) relative to the interviews he conducted with individuals at Napa State Hospital regarding the performance of Dr. Ortega".

[In fact, Dr. Laskay called alumni all over the United States to develop leads when the investigation came up empty.]

The attorney admitted that attached to the report are copies of documents which Dr. Laskay "apparently utilized in his investigation".

8. The secret disclosure and failure

to reveal said investigative report, including notes and conversations with witnesses (and interviewees), violated the previous order of the Superior Court, attached hereto as Exhibit (H), to produce all discovery to petitioner herein, as well as violating Skelly v. State Personnel Board (1975) 15 Cal.3d 194, which required that a state employer produce all investigative and other materials relied upon or relating to the termination procedure before the State Personnel Board. The content of this investigative report (negative as well as positive) would have assisted petitioner significantly in his defense and improved his ability to cross-examine witnesses. Its contents might very well have altered the outcome of the hearing before the State Personnel Board. . .

Dated this 1st day of April, 1985, in Napa California.

Supreme Court, U.S.
FILED
MAR 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

(4)

No. 85-530

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1985

Dennis M. O'Connor, et al.,
Petitioners,

vs.

Magno J. Ortega,
Respondent

On Writ of Certiorari
to the United States
Courts of Appeal for
the Ninth Circuit

APPENDIX FOR RESPONDENT

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

TABLE OF CONTENTS
(numerical/alphabetical/chronological)

Exhibits

1-21 Petitioners' at SPB Hearings
A-000 Respondent's in Opposition
i-xxiv Respondent's for Mandamus

Testimony

I. Oct. 29, 1981
II. Nov. 16, 1981
III. Nov. 17, 1981
IV. Dec. 29, 1981
V. Dec. 30, 1981
VI. Feb. 2, 1981
Folio VII

Pages/NATURE OF CONTINUING CONTROVERSY

135/Preliminary Observations/Comparisons /Past, Recent and Present Controversy

139/Supplementary Statement for the Brief

141/A. New Charge in Brief for Petitioners

151/1. State Personnel Board Rules Broken

154/2. Privacy Violations Started/Defended

169/3. Privacy and Dignity are Trampled

172/B. Specific List of Alleged Violations

173,183 203/b) Incompetency

173,183,204/c) Inefficiency

173,205/f) Dishonesty

174,206/o) Wilful disobedience

174,207/p) Misuse of state property

175,207/t) Other failure of good behavior

176/C. Federal Court Version of Above List

177,186/1) Sexual Harassment

180,198/2) Coercion

182,200/3) Purchase of a Computer

182/4) Violation of G.C. Sec.19572

184/D. False State Personnel Board Version

208/E. Latest (Barrel-Bottom) Allegation

211/Far Better Administrative Alternatives

INDEX OF CROSS-REFERENCES TO EXHIBITS

Whenever practical, [excerpts] appear where relevant, instead of just citing cross-references to the listing below, from which they are therefore omitted.

Those that cannot be excerpted (e.g., graphics of grievance channels or list of alumni to show rate of successful candidates for board certification in psychiatry at higher than national average and percentage that stayed in public service) are to be found with the rest that came with court letter of transmittal from which the following were excerpted to refute all new (sic), recent (sic), and old charges under "Nature of Continuing Controversy":

Page/Content excerpted from the record:

PAST, RECENT AND PRESENT CONTROVERSY

138/Exx. H, xiv; U.S. v. NIXON (1974) 418 U.S. 683,709

SUPPLEMENTARY STATEMENT FOR BRIEF

139/SHIVELY v. Stewart (1966) 65 Cal 2d 475, 55 CR 217

140/II:103/21, III:9/12

NEW CHARGE IN BRIEF FOR PETITIONERS

142/G.C. Sec. 19574.5

143/SPB rule 361a, Ex. 21, III:104, I:50,52,55, IV:40

144/SPB Rule 368

147/S.P.B. Rules 361 and 368

149/Ex. 21

BROKEN RULES, REGULATIONS, LAWS

151/State Civil Service Act, Bill of Rights, 1972 amendment of the California State Constitution

152/Exx. N, xiv, G.C. Sec. 18714, [SPB Rule 540]

153/[540.2, 540.3, G.C. Sec. 18714(a), G.C. 19703]

PRIVACY VIOLATIONS STARTED/DEFENDED

154/Cf. II:100-102 (App62), BUMPER v. N. Carolina, 391 US 543, 1968

155/Fifth Amendment

156/Ex. 19

157/WHITE v. Davis, 1975, 13 C3d 757, 773, 120 CR 94,104; Sec. 1, Art. 1, California Constitution

158/PEOPLE v. BELLO (1975) 45 CA3d 770, 119 CR 838), [VII:(80)32]

159/PEOPLE v. SUDDUTh, 1966, 65 C2d 543,546, 55 CR 393,395; Privacy Act of 1974

160/Cf. II:167 (App69)

161/Cf. II:112 (App73): Who misled whom?,

[III:7: Notes withheld during hearing]
162/[G.C. 19851 (r. 28): Right to subpoenas], Ex. H, II:150 (App69), [II:151]
163/[G.C. Sec. 11507.6], Ex. H
164/[III:20 (Only Dr. Reynolds came forth)], Ev. C. Sec. 776
165/[G.C. Sec. 11500. Admin. Adjudication, Dept. of Developmental Services, G. C. Sec 11513 (b), Attorney General's Opinion (No. 116, 1948), O'MARA v. State Board of Pharmacy (1966) 246 Cal.App.2d 8, 54 Cal.Rptr. 862
166/[G.C. 19582 (b), G.C. 18500]
167/[G.C. 18703], Article XXIV of the Constitution, [G.C. 18714, Art. XXIV (Civil Service Act), Sec. 6]
168/[Cf III:19: Dr. Laskay stayed too long]

PRIVACY AND DIGNITY ARE TRAMPLED
169/[III:91: Ex. 17 was accepted as evidence!]

FEDERAL COURT VERSION OF CHARGES
177/II:103, III:9

SEXUAL HARASSMENT
177/[State Personnel Board Ex. 000]
178/[G.C. 19059: Temporary employees' rights], SHEPHERD v. SPB (1957) 307 P2d 4, 48 C2d 41
179/[Sexual Harassment Policy Guidelines], MIMS v. L.A. Comm. Col. Dist. (1981) 116 Cal.App.3d 95, 172 Cal.Rptr. 524, VIELEHR v. SPB (1973) 107 CR 852, 32 CA3d 187
186/[I:14 (a. 27): ASSISTED fantasies; I:15 (a. 16): STUDENT not employed]
187/[I:15 (a. 28): No harassment; I:23 (a. 3): Fantasies WISHFUL; I:25-26: Hearing officer biased]
190/[I:26-26 (r. 48): No bad blood at all; I:34 (a. 28): Student wanted to help]
191/[II:110 (a. 15): Father unworried]
192/[I:37/7-24 (a. 20): Hearing officer bias]

193/[I:39 (r. 48): UNSURELY "harassed"; I:41 (a. 16, 28): Notice NOT timely if, in fact, sexually UNINTERESTED]
194/[I:42/7 - 43/10 (a. 24): No harassment]
195/Cf. I:42 (App50): "Recall" re-promised, Ex. H, [I:89-90 (r. 24): Had denied role]
196/(I:37, App192), [Ex. M]

COERCION

180/MAX. A.M.S. MACH. CO. v. International Assoc. of Machinists, Bridgeport Lodge, No. 30, 102 A 706,709, 92 Conn. 297; II:103, III:9; Ex. T-2 (App21): Statement by Chief Resident
199/[Ex. xv-I: Residents' Recollections]

UNAUTHORIZED PURCHASE OF COMPUTER

182/[I:112 (r. 7): Evidence withheld]
201/[I:95: Pre-empted Chief Resident (a. 14)]; MOORE v. Calif Minerals Products Corp. (1953) 252 P2d 1005, 115 CA2d 834
202]/[Personnel Administrative Manual (SAM), Electronic Data Processing Provisions, Procedures (2/6/81), 4819.3 (Cf. a-17)]

VIOLATION OF GOVERNMENT CODE SEC. 19572

182/Kinney v. Glenn, 198 So. 250,254, 29 Ala. Supp. 478; G.C. Sect. 19572 (b, c, f, o, p, t)

SPECIFIC LIST OF ALLEGED VIOLATIONS

INCOMPETENCE

172/Ex. SS, LAWS, 1921, c. 669, Sec. 30. SAUSBIER v. Wheeler, 299 N.Y.S. 466, 473, 252 App.Div. 267, III:122 (a. 29, App89)
183/[II:50 (r. 9): Accountant testifies]
203/Cf. III:71 (App84): On alumni who passed board examinations in psychiatry at higher rate than the national average and stayed in public service, Ex. xvi-b(1,2)

INEFFICIENCY

173/[G.C. Sec.14780 (r. 8): Re contracts], CONLEY v. Board of Ed. of City of New Britain, 123 A.2d 747,751, 141 Conn. 488
183/Cf. I:119 (App56): Re $1800 contract; [II:30 (r. 8): GC 14780 Violation]
204/III:74 (r. 60, App85): Inefficiency trumped-up
205/Exx. 16a,b; G.C. Sec. 14780

DISHONESTY

173/III:122 (a. 28, App89)
174/STATE ex rel. NEAL v. State Civil Service Commission, 72 NE2d 69,71, 147 Ohio St. 430
205/I:112

WILFULL DISOBEDIENCE

174/McNAMARA v. St. Louis Transit Co., 81 S.W. 880,881, 182 Mo. 676, 66 L.R.A. 486, quoting U.S. v. TAYLOR, 2 Summ. 586, 28 Fed. Cas. p. 31; STATE ex re. RICHARDSON v. Board of Regents of Univ. of Nevada, Nev., 269 P2d 265,276; NEELY v. CSPB (1965) 47 CR 64, 237 CA2d 487

MISUSE OF STATE PROPERTY

175/Eric v. Walsh, 61 A.2d 1,4, 135 Conn. 85; Cf. III:62 (App 82): Who owns computer?

OTHER FAILURE OF GOOD BEHAVIOR

175/[III:126 (a.37): Ex-director, now staff], Blake v. SPB (1977) 102 CR 50, 25 CA3d 541
176/Orlandi v. SPB (1968) 69 CR 177, 263 CA2d 32

D. FALSE PERSONNEL BOARD VERSION

185/II:103, III:9
206/[Ex. xv-J: Peer Recommendations:]
207/Cf. V:14 (App103) on "dismissal"

E. LATEST (Barrel-Bottom) ALLEGATION

208/Dr. O'Connor's deposition, p. 60, and Ex. xxi in Argument "2-d"
210/Cf. "Open-ward management of disturbed mental patients of both sexes," MENTAL HYGIENE, January, 1962

FAR BETTER ADMINISTRATIVE ALTERNATIVES

212/Article XXIV of the State Constitution
213/Article I of the State Constitution
213/Fourteenth Amendment

APPENDED EXHIBITS AND TYPED RECORDS

PAGES where EXHIBITS are elaborated on:

P/Ex (+x-ref to reply or its appendix):

PETITIONERS' EXHIBITS for S.P.B.: 1-21

1/1 (a. 15): Writer not employed
2/2 (a. 16): Intern not an employee

2/3a (r. 12): LOA changed to 6 months
/4 (r. 12): Dr. Ortega must void LOA
/7 (r. 14): Mrs. Owen quotes ex-con

3/10 (r. 46): Computer "disappears"
4/13a (r. 7): Approved subpurchases
/13b (r. 10): To link data bases
/14 (r. 7): "Thank-you" to residents
5/15a-1: "Forgotten" thank-you note
/15a-2 (r. 5): $2000-printer donated
6/15b-3 (r. 7): 15a-1, but signed
/16a (r. 8): "Unprocessed" contract
/16b-1 (r. 9): Same as 16a but signed
/16b-2 (r. 8): Approved Jul 15, 1981

6/17 (r. 27): Dr. Onne's photograph
/18 (r. 27): Her Valentine Card

/19 (r. 27): Classic book of poems

7/21 (r. 11): vs. automatic dismissal

RESPONDENT'S (A-000) IN OPPOSITION

7/D (r. 5): Prior Feasibility Study
8/D-1 (r. 9): Computer for training

9/E (a. 19): A senior resident

13/G (a. 40): Due Process Violations

14/H (r. 28): Superior Court Order:

16/J (6): vs. "false deadline"
/L (r. 22): Before the hearing

17/M (r. 24): Biased Hearing Officer
/N (r. 21): Grievance channel

18/O (r. 60): Demurrer

19/P (r. 23): "Rebutted" by souvenirs

21/T-2 (r. 19): Chief Resident noted
25/T-3 (r. 18): Senior Resident noted

29/U-2 (a. 19): Missing Testimony

30/Z (a. 15, 16): Complaint ritual

29/CC: Agenda for Union Board Meeting

31/JJ-2 (r. 26): Threat of scandal

31/JJ-3 (r. 28, 64): Subpoenas denied

33/SS (r. 21): Investigate conflicts?

38/CCC (r. 14): Final Query

EXHIBITS FOR MANDAMUS PETITION: i-xxiv

42/viii (r. 33, a. 26): 2nd delay

43/x-a (a. 15): Exceptions to findings
44/xi-a (a. 36): Undocumented opinion

44/xv (a. 28): Exhibits in VII:192-8
/xv-A (73): Stanford assessment

45/xv-C-2 (8): Dr. O'Connor's ex-boss
/xvi-c (a. 28): An alumnus' report

46/xvii (a. 40): Hearing premature

STATE PERSONNEL BOARD HEARINGS, 1981

P/Folio:Page (+x-ref: reply, appendix)

HEARING OFFICER's Reversible Errors
49/I:2 (a. 14): Dr. Vaughn recalled
/I:8 (a. 10): False first promise
50/I:36 (a. 24, 28): Access promised
/I:42 (a. 24): Third false promise

Dr. VAUGHN's Testimony
51/I:47 (r. 12, 54): Ex-con credible?
52/I:55-56 (r. 13): "Get Ortega"?

More HEARING OFFICER's Promises/Errors
52/I:79 (a. 14): Recall promised
53/I:80 (r. 25): To AWAIT discovery
54/I:88-89 (a. 25): Access O.K.

Mr. FRIDAY's Testimony
55/I:112 (r. 7): Documents withheld
56/I:119 (r. 8): Contract approved

Mr. RUBIN's Confession as NAPA Counsel
56/I:122 (a. 16): Incomplete materials

More HEARING OFFICER's Promise/Error
57/I:124 (a. 11): Another promise
/II:2,5 (r. 21): re Skelly
59/II:52 (r. 28): Subpoenas touted

Dr. O'CONNOR's Testimony
60/II:85,86 (r. 51): A.L. illegal
61/II:88 (r. 16): DUE process denied
63/II:100-102 (a. 6): "Routine" call?
65/II:103 (a. 20): No coercion found
66/II:118-119 (r. 20-21): Rule 131?
67/II:112 (a. 20, 22): Who was misled?
/II:114 (r. 8): When aggrieved?
68/II:126 (r. 16): Vacation requested

More HEARING OFFICER's Errors
68/II:143 (a. 25): Subpoenas refused
69/II:150 (a. 39): Defy court order

Dr. LASKAY's Testimony
69/II:167-171 (r. 17): "Forgery"?
74/III:1 (m. 1): ILLEGAL appointment
/III:6-8 (a. 15): Who complained?
75/III:9/ (a. 20): No coercion found
76/III:10-11 (a. 14, 25): Relevant?
/III:11-12 (a. 11): Repudiation
77/III:20-21 (m. 1, r. 29): Empty

More HEARING OFFICER's Errors/Mistakes
78/III:21-23 (r. 29-31): Illegal
79/III:21 et. seq. (a. 20): Arrogance?
/III:39 (r. 9): Incomplete materials
80/III:44-45 (a. 23): "Abrasive"?

Napa Counsel (Mr. RUBIn) gives in
81/III:47-48 (a. 24): Surrendered
82/III:62 (a. 58): Computer secured

Stanford Chairman (Dr. GONDA) testifies
83/III:69 (r. 10): Stanford important

84/III:71 (r. 10): Work not an issue

HEARING OFFICER re INEFFICIENCY charge
85/III:74 (r. 60): Trumped-up charge

Dr. SUTTON's Testimony
85/III:81-82 (a. 30): Uncorrupt power
86/III:90 (r. 26): To inhibit support

Child Consultant's Testimony
88/III:110 (r. 10): Losing UCSF link

Ex-DIRECTOR's Assessment of Respondent
89/III:122 (a. 28): Director fr 1964
90/III:126 (a. 37): Director as staff

Contributor Explains Contributions
90/III:131 (a. 30): Resident -> staff

RESEARCH CONSULTANT's Testimony
91/III:137 (r. 5): Feasibility Study

More HEARING OFFICER's Dissimulation
92/IV:3-7 (a. 8): Sham indecision

Mr. DONOVIEL's Testimony
94/IV:40-41 (r. 13): "Get Ortega"

Assistant Business Manager's Testimony
95/IV:19 (r. 8, 21): Second Friday
/IV:20 (a. 10): "Recall" Dr. Ortega
96/IV:21/24: Purchasing uncertainties

Testimony by CONSUMERS of Information
98/IV:54 (r. 10,25): 1st yr resident
100/IV:68/26 - 69/26 (a. 30): Leading

Ex-EXECUTIVE DIRECTOR's Testimony
102/V:10 (r. 9): Supporting decisions
103/V:13-15 (r. 7): Poor management
105/V:18 (r. 51): When is A.L. needed?

More CONSUMER Testimony

106/V:28 (a. 24): How to treat talent?

Ex-EXECUTIVE DIRECTOR's Testimony

107/V:35 (r. 11): Budget wanged by UCD
/V:41 (r. 42): Before Dr. O'Connor

More CONSUMER Testimony

109/V:53 (a. 19): Ex-con not believed
/V:57 (r. 20): 2nd year resident:
110/V:77 (a. 28): Alumnus at hearing
111/V:82 (r. 5) Senior resident:

More HEARING OFFICER's Errors

113/V:91 (r. 31): Fair hearing?
114/V:95-96 (a. 26): Is this fair?
116/V:110-111 (r. 31): Hearing denied
/V:110-111 (r. 32-33): No hearing
117/VI:4-5 (r. 34): Collusion sensible

Dr. ORTEGA's Testimony

118/VII:47 (r. 15,18): Volunteerism
119/VII:137 (r. 18,48): Lawlessness
/VII:173 (r. 36,43,48: Sexual irony
121/VII:225 (r. 58): Homosexual scorn
122/VII:387-9 (a. 19,37): Turn-around!
131/VII:440 (r. 56, a.19): Trumped-up!
132/VII:443 (r. 56): What did happen?
134/VII:523 (r. 37): What will happen?

Cross-references, EXHIBITS, TESTIMONY

2/[Sexual Harassment Policy due June 15, 1981: ex post facto.]

6/[Under G.C. Sec. 14780, no further approval is necessary.]

13/G.C. Sec. 18714, 18703, Ex. 13a, SPB Rule 540, 540.2, 540.3

14/Skelly Hearing 16/Ex. xv-J

19/Exhibit E, BRYANT v. SPB, 1950, 96 CA 2d 423, 215 P 2d 512, SKELLY decision

26/G.C. Sec. 19574.5

29/Exx CC, ZZ, Argument "1-c", G.C. Sec. 3528

30/[I:122] 32/(Exhibit xviii):

36/Exhibit 16b 37/(Exhibits 13a,b)

38,40/Rule 131 42/(Cf. Exhibit E)

42/(Cf. Exhibit P) 43/G.C. Sec. 18714

43/(Exhibit G) 44/Ex. xiv, graphic

44/(2 CAC 540-3) 44/(Exhibit N)

44/VII:192-8 47/([17], r. 27)

55/Discovery Act 58/Rule 61 Skelly

73/(Exhibit xxi) 76/Exhibits 17-19

76/Exhibit H 78/under 776

93/V:95 93/V:96

97/Ex. SS 118/SPB Rule368

119/GC 19302a 121/Rule 303

EXHIBITS

All had been designated for inclusion in the Joint Appendix. The copies from the court files from which the following and those in body, addendum and appendix of the brief had been excerpted have been submitted to the Court with letter of transmittal from the clerk of the Napa County Superior Court, whose administrative record was asked to be noticed by federal court at the behest of petitioners.

Ex. 1 (a. 15): Writer not employed:

"Sept. 4, 1981

"Dear Dr. O'Connor:

During my employment in the Prof. Library at the hospital I had some unpleasant contact with Dr. Ortega.

For the first nine months I saw little of him. . ."

[Temporary nine-month employment as student professional assistant was over

after respondent was dismissed by phone when additional charges were invited.]

Ex. 2 (a. 16): Intern not an employee:

"To Whom It May Concern:

"This letter is a 'statement regarding contact I had with Dr. Ortega as a social work intern during the academic year of 1978-79. . ."

[Sexual Harassment Policy invited from NAPA by June 15, 1981: ex post facto.]

Ex. 3a (r. 12): LOA changed to 6 months:

"I have NOT requested and/or authorized any leave of absence from my position due to family illness or obligations and in no way intend to be away from my job until January 8, 1982, which the form claims is my date of return."

s/Dr. Vaughn

Ex. 4 (r. 12): Dr. Ortega must void LOA:

"Return at an earlier date is only with the approval of the appointing power".

Ex. 7 (r. 14): Mrs. Owen quotes ex-con:

"felt the decision not to allow him to change his rotation period and work here during the month of July

was a way of reprimanding him.

". . .if we wanted any statement from him he would be glad to supply it. He indicated that he enjoyed the residency program, that he was getting good recommendations from other staff, and that he hoped to make a career in state service. The only part he disliked was the fact that Dr. Ortega used his position to press the residents in certain areas."

Ex. 10 (r. 46): Computer "disappears":

"8/17/81 1120 hrs - Officer to Professional Education to take report of missing property.

"Officer talked with Mrs. CIRAULO (RP) who stated she received a call from Dr. ORTEGA (S) this morning between 0800 and 0810 hrs. He wanted to know what appointments he had. He then advised her that he had the computer.

"The computer . . . is kept in Rm. 1363. It is made up of four units. . .

"It has an approximate value of $5,000.00

"It is unknown when ORTEGA came to the hospital and removed the computer. Itis believed it was sometime this weekend. (8/15 or 8/16)."

"RECOMMENDATIONS: R/O recommends this matter be turned over to the committee who are reviewing Dr. Ortega's department at this time, to determine if any criminal activity has occurred.

s/JBH/jgv/ml

Ex. 13a (r. 7): Approved subpurchases:

"Disk II IF (for faster correlation) $645
"BW Monitor (to relieve overcrowding) 240
"Applewriter (software, not a printer) 75"

Ex. 13b (r. 10): To link data bases:

MODEM and Timer (for access to USF, Stanford) $350"

Ex. 14 (r. 7): "Thank-you" to residents:

"April 13, 1981

"TO WHOM IT MAY CONCERN:

"I want to thank all who have contributed to the acquisition of the Apple Computer for the Professional Education Department of Napa State Hospital. It will be used exclusively for training of psychiatrists.

"Sincerely,

"s/D.M.O"

Appendix-5

Ex. 15a-1: "Forgotten" thank-you note:

"Apr. 13

Dear Mr. M:

"Thank you for your magnanimous donation of a printer and the associated hardware (total of $2,210.00) to the Professional Education Deprtment of Napa State Hospital.

"We share your hope that this will facilitate the dissemination of learning among all professionals.

"Sincerely,

"(Unsigned)"

Ex. 15a-2 (r. 5): $2000-printer donated

"April 4, 1981

"Dear Dr. Ortega,

"I am pleased to inform you that management have approved donation of a printer and the associated hardware for hook-up with your Apple computer to be used for education and research at the Napa State Hospital. We hope you will accept this donation as a small token of our willingness to participate in your program.

"The above equipment is covered by a 90-day warranty. If you have any question on this matter please don't

hesitate to call me.

"Sincerely,

"s/A. M."

[Apple has an agreement with California to introduce micro-computers state-wide for mutual benefit.]

Ex. 15b-3 (r. 7): 15a-1, but signed: "s/D.M.O."

Ex. 16a (r. 8): "Unprocessed" computer training contract.

Ex. 16b-1 (r. 9): Same as 16a but approved by Chief, Systems Review, Health and Welfare Agency.

Ex. 16b-2 (r. 8): "(E)ffective from date of such approval" (July 15, 1981, before respondent was placed on A.L.)

[Under G.C. Sec. 14780, no further approval is necessary.]

Ex. 17 (r. 27): Dr. Onne's photograph as a model.

Ex. 18 (r. 27): Valentine Card to rebut Dr. Sutton.

19 (r. 27): Classic love poems for "rebuttal"

[If a wrongly worded warning can save

criminals from any prosecution, surely wrongful acts can reverse dismissals.]

Ex. 21 (r. 11): vs. automatic dismissal:

"June 19, 1981

"To: Mrs. Owens, Personnel Officer

"From: Magno J. Ortega, M.D.

"Subject: Richard M. Vaughn, M.D.

"Dr. Vaughn requests delay of his next rotation and will be on Leave of Absence from July 1, 1981 until he reports at Highland Hospital.

"We will let you know when he reports there."

"s/M.J.O.

Ex. D (r. 5): Prior Feasibility Study:

"March 18, 1981

"Dear Magno:

"Here are the justifications and specifications for the APPLE system that I recommended for your training program. . .

"Note that the MODEM and Timer may best be purchased through the University. . . The Timer would allow carrying out on-line reaction time experiments and the Modem would allow you to address the University

computer center or any other of the various data nets that might interest you including, of course, the Libraries of Congress and NIH (e.g. Medlars) and so on.

". . . (I)t would allow residents to have hands-on experience with a computer. They would be able to learn Basic programming, compute simple statistics for themselves and have access to the computer center at the University of California for more elaborate and detailed multivaried statistics. . .

". . . It could, of course, very easily be totally usurped by people like library and clerical services since it also makes preparation of manuscripts and automated printing of letters very easy.

". . . I hope this is the sort of information that you want.

"With best personal regards,

"s/Noch"

Ex. D-1 (r. 9): Computer for training:

"Memorandum

"May 22, 1981

"Magno Ortega, M.D.

"Your contract for Professional Education's computer is being reviewed by Mr. Friday. I would ask

you to please make an appointment at your earliest convenience to see him and discuss this contract.

"s/D.M.O."

Ex. E (a. 19): A senior resident:

"A. Overtime Compensation. This allegation is completely out of focus and perspective. It fails to recognize . . . the active participation of the residents, in conference with Dr. Ortega, to seek ways and means of raising money to purchase a mini-computer. The(ir) interest . . . arose, in large part, from my work with similar computers under the direction and supervision of Dr. Enoch Callaway, Director of Research . . . University of California, SFO. This work was one day per week in January, February, and March of 1981, and was part of my residency in Psychiatry . . . This led to our conferences previously mentioned . . . It is not at all clear that Dr. Ortega violated any . . . policies or regulations since nothing was really done. . .

"C. Sub-paragraph 4 of this allegation states clearly, succinctly, and sufficiently all that needs to be said about this allegation: "4. The contract has not been approved and Mr. Saeedi has not been paid." I would ask then this simple question: Where and what is the evidence or substantiation for any punitive action when no one has

a basis for complaint? Is the State Mr. Saeedi's advocate for this action? . . .

"E. Deception. This entire allegation is patently absurd for a responsible executive director or administrator to present. It reflects as much upon the ineptness and inability of the executive to administer and to manage as it does upon the subordinate to present documents for consideration and signature.

Sub-paragraph E 1) states: This was done under the guise of an emergency and after you refused the Executive Director's order to go through the chain of command." Are we to believe that the Executive Director is unable to give cogent orders? Further, in this instance, what is the chain of command? (I believe it to be Director of Professional Education to Executive Director.) Again, as in previous allegations, the sub-purchase orders were never executed, no money was spent and nothing was purchased. (Now if you were fishing, your catch would have escaped because you attempted too early to pull the hook.)

"Next, we read in this allegation direct statements regarding Dr. Ortega's intentions with Dr. O'Connor to "deliberately mislead", "actively deceive" and to not follow NSH policy and procedure. Now, I

ask you, if Dr. O'Connor is fully aware of these policies and procedures, why did he not cause this interchange to come to a halt and why did he not counsel Dr. Ortega on his apparent, patent and even blatant disregard for these policies? It is apparent to me that Dr. O'Connor was a willing participant in this matter, neither misled nor deceived until some subordinate later brought this to his attention.

"Paragraph F 1) alleges that Dr. Ortega removed the computer and printer from NSH on August 15-16, 1981, without authorization and took them to his home. Ownership of this equipment has not been established; therefore it seems ludicrous to allege that authorization is needed for one person to remove personal property from one place to another. It does not belong to NSH or to the State of California; it does not belong to any indivdual who has filed a law enforcement or legal complaint and there appears to be no valid reason for accusing Dr. Ortega of anything.

"G. Leave of Absence . . . One thing is clear through personnel policy and Dr. Ortega's previous actions: Dr. O did have the basic authority to place the medical resident on a leave of absence . . . I do not understand nor are here given any explanation of why it became necessary for someone to (a)void a leg-

itimate, duly authorized Leave of Absence "in order to honor the State's obligation to an employee". This smacks again of administrative incompetence and a real failure of the executive director to support a department head. Furthermore, it is not at all clear what "inappropriate personnel practices" were carried out by Dr. O. . . .

"I. Sexual Harassment of Female Resident. This allegation is nearly unbelievable in California . . . To allege misconduct of an American citizen ten or more years after the alleged misconduct is so ludicrous, so far out of the bounds of common law as to be unworthy of addressing by this hearing . . . Do we ask why no other similar incidents are mentioned? . . . Or do we question why this lady has continued a close professional relationship on the staff of the Department of Professional Education in the light of her serious allegation?

"STANDARDS: . . . He is uniquely incisive, stimulating, challenging, and especially is he personally professional. For each resident trainee Dr. O applies himself to assure the best possible training program. In no other residency program with which I am familiar is the Professor so intimately involved, so fully committed to the training of his residents . . .

"This hearing has, in our view, no

other recourse than to reverse the improper dismissal of Dr. O. and to reinstate him . . ."

Ex. G (a. 40): DUE PROCESS VIOLATIONS:

"The Personnel Board Rules were promulgated under mandate of Government Code Sec. 1874:

"(a) Nothing in this part shall preclude the board from providing by rule for a system of adjusting employee grievances which SHALL be administered WITHIN the department BEFORE recourse to any remedy provided in this part (which includes:

(Sec. 18073. The board shall provide for dismissals, demotions, suspensions and other punitive action for or in the State civil service in accordance with Article XXIV of the Constitution and this part.)

"THUS, VIOLATIONS THEREOF VIOLATE MORE THAN THE RULES:

a. SPB Rule 540. A grievance exists whenever an employee believes that he/she has in any manner been adversely affected in employment by an action or failure of action by the appointing power, a supervisor, or another employee.

"540.2 PURPOSE AND OBJECTIVES . . . Every reasonable effort should be made intially by the employee concerned and the employee's immediate

supervisor to resolve the grievance informally. If such efforts do not produce a solution, the objectives in following the more formal procedure are first to establish what the facts of the situation are and then to arrive at an appropriate solution under these facts rather than dealing in personalities . . . at as early a stage in the procedure as practicable, BY SOMEONE NOT INVOLVED IN THE IMMEDIATE SITUATION or direct line of supervision.

540.3 SCOPE . . . Employees SHOULD be encouraged to use the less formalized grievance procedure unless they BELIEVE this procedure will not afford them adequate consideration of their grievance.

[This is the justification for the Skelly Hearing: if the aggrieved is the supervisor, he must have all the materials on which his grievance is based for the supervisee to explain away and only if the conflict cannot be resolved informally may the supervisor, at his discretion, decide on formal disciplinary action.]

Ex. H (r. 28): Superior Court Order:

"Judge Hon. PHILIP A. CHAMPLIN, Dept. One, 11/2/81

"MAGNO J. ORTEGA, M.D., Petitioner, In Pro Per

"D. M. O'CONNOR, M.D., Respondent, ASHER RUBIN, Deputy Attorney General

"ORDER TO SHOW CAUSE FOR STAY ORDER: COURT NO. 43403

"MOTION TO PRODUCE:

"After hearing arguments of counsel and the matter having been submitted, the Court orders that the Motion to Produce be granted as follows:

"1. That copies of all sub-purchase orders be furnished to Petitioner;

"2. That Petitioner be furnished any statements taken relating to persons in connection with the investigation;

"3. That Petitioner be furnished any rebuttal documents to Dr. Sutton's statement.

"The Court further orders that the stay be denied provided the Attorney General complies with the discovery order.

[Can denial of stay still be vacated since the Attorney General did not

comply with the discovery order?]

Ex. J (6): vs. charge of false deadline:

"DEPOSITIONS and STATEMENTS
by NAPA EXECUTIVE DIRECTORS:

"What is the significance in state operations of April 15?

"Dr. Linn: It is the last day of the fiscal year for purchasing equipment.

"Dr. Spratt: It's the date that budget requests for the next fiscal year must be submitted to the Department.

"Dr. O'Connor: I'm not sure (on the witness stand)."

[For other summarized disagreements, see Exhibit xv-J.]

Ex. L (r. 22): BEFORE the hearing:

"The Superior Court
"Napa County, Calif

"Your Honor,

"I received a strange telephone warning today that I might be arrested like another doctor was this week. . .

"What makes me suspicious is that I got a hearing date three months ahead of the on-going schedule:

within a month, almost to the day, that I received notice of punitive action, unless I resign.

. . .

"And I can't get a continuance of hearing except for good cause if I am under arrest.

"Hence this anticipatory writ for habeas corpus, if this is permissible.

"Sincerely yours,

"s/M.J.O.

"2 October 1981"

Ex. M (r. 24): Biased Hearing Officer:

"To Whom It May Concern:

"This is what I heard the hearing officer, Mr. Waller, say before the hearing on Oct. 29, 1981, started:

"'Oh - We have what we need here, this won't take long . . .' etc., etc.

"Signed under penalty of perjury."

Ex. N (r. 21): Denied grievance channel:

"This is a true copy of my plea to SPB for informal hearing by law of prior grievances before the Secretary of Health:

"AN APPEAL

"I WAS UNJUSTLY DEPRIVED OF MY JOB, A JOB WHICH I THOROUGHLY ENJOYED WITHOUT BEING ABLE TO SAY:

"I don't know what the charges are -- I don't think anything came out that I would consider a charge. . .

"I thought I had satisfied every question they brought up. . .

"I am at a loss to go into detail.

"There was no evidence raised. . .

"The fact is, I even offered my resignation that first day. . .

"I understand the Secretary is a reasonable man. Is it possible for you to make an appointment for me to see him?

"I DON'T EVEN KNOW IF SAYING ANY OF THESE WOULD HAVE MADE A DIFFERENCE AT ALL NOW!

"s/M.J.O.

"31 Aug. 81"

Ex. O (r. 60): DEMURRER (Pres., S.P.B.):

"To Dr. O'Connor, delivered October 28, 1981:

"'Granting that all you say in your complaint is true, you still have no legal claim against me, because we are in the wrong court, (or) the complaint just does not

state facts sufficient to constitute a cause of action, (or) there is a wrongful misjoinder of parties or causes of action.' (Cf. Exhibit E.)

"Bryant v. SPB, 1950, 96 CA 2d 423, 215 P 2d 512: 'If notice is required, the complaint must state sufficient facts to show that the accused committed some type of prohibited conduct.' (The 'accused' in this landmark case was not even a 'permanent' employee.)

[The Skelly decision recognizes the property interest of permanent employees in tenured employment.]

Ex. P (r. 23): "Rebutted" by souvenirs:

"October 23, 1981

"Hearing Office Section
"State Personnel Board

"Dear Sirs:

"Dr. Ortega has organized and directed an outstanding psychiatric residency training program that has produced many extremely qualified psychiatrists who now staff Dept. of Health and Dept. of Corrections institutions. . . The quality of training given has enabled the graduates to treat the most difficult patients and to assume positions of leadership within the Departments. . . Finally, the rate of

passage of specialty board examinations of the graduates has been excellent and has exceeded the rate of most other residency programs. . . (I)t is totally inappropriate to fire him on the basis of the charges presented(:) . . .

"1) Allegations concerning the computer. I feel that it is not improper for residents or other employees to donate money to purchase equipment that they would like to use in their work or training which the state cannot provide. . . Furthermore it is always possible to disagree or refuse his suggestions.

"2) Payment of consultant to train residents on the usage of computer. For at least the last ten years all consultants have been paid for a full days salary when they come to give a guest presentation. . . Many times travel expenses would far exceed the amount they are paid in the customary fashion. . . Dr. O'Connor and other hospital administrators have been well aware of this practice for many years.

"3) Allegation that Dr. Ortega 'took home state property'. . . In the first place, Dr. Ortega's home has been regularly used by residents as an off-campus training site for at least ten years. . . Dr. Ortega designed the architecture of his home in order to facilitate group meetings and other training sessions.

"4) It is alleged that Dr. Ortega deceived Dr. O'Connor into signing hospital requisitions to purchase minor parts for the computer. I feel it is Dr. O'Connor's responsibility as an administrator to review materials before he signs them.

"5) Charges of sexual harassment. . . In these ten years I have never heard of any incidents of 'sexual harassment'.

"In summary. . .These irregularities that may exist are relatively minor when you consider the overall performance of Dr. Ortega and in no way justify the decision to dismiss him.

"I hereby certify under penalty of perjury, etc."

"s/Dr. Sutton

Ex. T-2 (r. 19): Chief Resident noted:

"Fr, 31 July 81:

"When we got to the hospital, we found Mr. Friday talking to the secretaries and we were soon told that Dr. Ortega's office was locked, the locks were changed, and that Dr. Ortega had been asked to take a vacation. . .

"Mo, 3 Aug:

". . . The meeting was requested

by Dr. O'Connor to tell us what was going on. He was sorry for the investigation but it was the first time that two people had complained, in writing, and he was obliged to look into it.

"He was very positive nothing would change and he spoke very fondly and highly of Dr. Ortega. He related, at length, his own application to Napa State Hospital and choice of the program in spite of having been accepted by many other reputable programs in the country. It was Dr. Ortega's creative approach that had attracted him to the program. He also spoke about his problems with Dr. Ortega when he did not want to go to Mt. Zion Hospital, but during his Board examination had been grateful to Dr. Ortega for making him go to Mt. Zion.

"He was so positive that all would be well . . . but got Dr. Vaughn (or Dick as Dr. O'Connor called him) sufficiently worried to make him ask about possible retaliation when Dr. Ortega returned. Dr. O'Connor reassured him by saying that Dr. Ortega was not that type of person.

"Fr, 7 Aug:

". . . I was asked questions about . . . the difficulties I had with Dr. Ortega. I remember feeling rather angry during the week-end that followed at the way the inter-

view had concentrated only on the negative events. . .

"Week-end of 15-16 Aug:

"The computer 'disappeared' and as a result we were told that his vacation had been made 'indefinite'.

"Tu, 1 Sep:

"Before the 10:30 A.M. conference, Dr. Brannick said that he had an announcement to make. He said that he had been instructed by Dr. O'Connor to inform us that Dr. O'Connor had decided to dismiss Dr. Ortega. Dr. O'Connor wanted us to hear of the news before it was announced to the rest of the physicians at the Medical Staff Meeting on Wednesday afternoon, the 2nd of Sept.

"The shock of the news and the discussion that followed led tothe cancellation of the case conference that morning. We tried to meet with Dr. O'Connor but he was not available -- in spite of the fact that he knew that Tuesday was the only day when all the residents were at Napa. Therefore a letter was drafted to Dr. O'Connor and was hand-delivered. . .

"We, 2 Sep:

"Dr. O'Connor agreed to meet with us for a "brief" period in the afternoon before the Medical Staff Meeting but the meeting lasted for

1-1/2 hours.

". . . To the question "Why now" he said . . . because of written information he had received some six weeks ago. He had received simultaneously in writing two separate issues from two separate people about two separate people. . .

"Dr. M. asked if Dr. Ortega was investigated for the two allegations only.

"I had commented that it had looked like his whole life had been investigated.

"Dr. O'Connor then said that Dr. Ortega had offered his resignation but that Dr. O'Connor would not accept it. Instead, Dr. Ortega would go on vacation and they would investigate him while he was away.

"Dr. O'Connor then said that on Friday last (August 14th), Dr. O'Connor had agreed to accept the resignation but Dr. Ortega had refused to resign and therefore Dr. Ortega had to be dismissed.

"Dr. S. asked if he would find a new Chief who is as creative and one who would be able to maintain all the affiliations that our program now enjoyed.

"Dr. O'Connor said that he could not promise some quite as creative but that he would look all over the

U.S.A. if necessary to get the best replacement and that he would always be there to take care of our interest.

"Whereupon Dr. P. asked Dr. O'Connor that he was promising all this but would he still be there to keep his promise.

"Dr. O'Connor assured her that he would still be there unless a resident decided to stay there for 20 years.

"He informed us that we may see Dr. Ortega informally and that he hoped that he too would be able to see Dr. Ortega.

". . . He had serious charges against Dr. Ortega and that even if Dr. Ortega went to the Supreme Court and won, he would never be able to come back to Professional Education.

"Then Dr. C. asked about Dr. Ortega's pension rights and we were told that a person loses all pension rights when he is fired.

"s/A.G."

Ex. T-3 (r. 18): Senior Resident noted:

"1. Dr. O'Connor mentioned that complainer (?) had stipulated in letter that if Administrator of NSH would not look into his complaint the State investigators would be called in. . .

"(S)aying that it was customary . . . to put the program directors on administrative leave. To some extent he speculated that investigators would not be inhibited in doing their job."

[Another choice between not using "insiders" to investigate or violating G.C. Sec. 19574.5.]

". . . He solicited our cooperation in the investigative procedures. . .

"Mr. Stratton: 'Is it a common practice among Filipinos to call one another aunts and uncles even if they are not relatives?'

". . . I felt very uncomfortable then. If this was an investigation and if I had a lawyer then, would he have allowed me to go through further interrogation? I question the partiality of the investigators at this point. . .

"There were side-comments about attracting the residents into buying the computer by promising compensation time if they work on it on a holiday and the expectation to be reimbursed. Dr. Laskay commented that it appeared as if it was being given as a gift when it was not.

"There were no questions on sexual

harassment as warned by Dr. Vaughn would be one of the issues to be investigated. Dr. Vaughn brought this up after the first meeting with Dr. O'Connor.

"9-2-81

"The residents brought up uncomfortable feelings generated during the interrogation by the investigation committee. We learned from Dr. O'Connor himself that the issue about Dr. Laskay attempting to interview Dr. Metcalf was not documented in the committe's report to Dr. O'Connor. Neither was it documented that I was asked a racial question.

[It is natural not to try to incriminate one's self. Since these excerpts leave the rest to the imagination, it must pass the test used in making a summary judgments, which deliberately errs towards maximum leniency towards the party against whom the judgment is sought without going through trial by ordeal.]

"The general feeling was that it was a biased investigation but Dr. O'Connor responded that it was not.

The credibility of an allegation of sexual harassment which occurred years ago was questioned.

"Complimentary statements about Dr. Ortega as a unique and competent chief were brought up by the residents. . .

"I asked Dr. O'Connor whether the memorandum still holds about residents not being allowed to contact Dr. Ortega officially or unofficially was still binding. He said that Dr. Ortega was no longer officially connected with NSH and that the residents should feel free to contact him. He said he would call Dr. Ortega himself one day.

"I also asked Dr. O'Connor if the residents were still expected to produce the checks and "thank-you" letters or else expect administrative action for insubordination. Mrs. Owens stated that we did not have to, unless there was a court order to do so.

[Being sued for fraud is still being held over Dr. Ortega's head for plea-bargaining purposes.]

". . . Dr. O'Connor reassured the residents that UC Davis wouldn't take over the NSH program and that he'll always try to protect the interests of the residents.

". . . Dr. Metcalf, one of the faculty, . . . brought up the fact that he had been called by one of the investigators who asked him -- Tell me all the bad things you know about Dr. Ortega. He said this made him very angry and upset and that he could (not) have asked it in a less subtle way.

"I declare under perjury that the foregoing is true and correct.

"s/"(Cf. Ex. ZZ, Argument "1-c")

U-2 (a. 19): MISSING FROM TESTIMONY:

(18)108: ". . . Both chiefs of residents before and after my dismissal attended a physician's union meeting which questioned whether I should be represented against the hospital whose executive director was rumored to be a part of the bargaining team. . . And the agenda of that meeting (Exhibit CC) I now introduce as evidence of violation of code provisions on legitimate representation of public employees.

G.C. Sec. 3528. Employment organizations shall have the right to represent their members in their employment relations, including grievances, with the state. . .

Ex. Z (a. 15, 16): COMPLAINT PROCEDURES:

"Time limits defined in these sections shall be adhered to unless a mutual WRITTEN agreement exists bet-

ween the aggrieved person and the appropriate reviewers.

[No such written agreement was discovered even after court ordered that all investigative notes be produced. Counsel for Napa acknowledged [I:122] not having sent this document before petition for discovery was granted.]

". . . The initial contact with the counselor must be:

"(1) Within 30 days of the alleged discriminatory action or decision affecting the employee(s); or

"(2) Within 30 days of such action or decision having come to the attention of the employee. . ."

Ex. CC: STATE EMPLOYED PHYSICIANS ASSOCIATION BOARD OF DIRECTORS MEETING, Saturday, Sept. 19, 1981: (8) New Business (d) Defense of management as members (this item discussed the longest).

Ex. JJ-2 (r. 26): Threat of scandal:

"Oct. 30, 1981

"Dear Dr. Ortega:

". . . (I)f you intend to

introduce that document we will be compelled to offer rebuttal evidence which is in our possession. . . In the interest of fairness, however, we are hereby informing you that we do have relevant evidence bearing on Dr. Sutton's credibility and we do intend to use it should it be necessary. . . Finally, if you do introduce the declaration of Dr. Sutton, please so inform us by telephone so that we can subpoena her for cross-examination.

"Very truly yours,

"s/Deputy Attorney General

[Surely if one can threaten to subpoena the innocent supporter of the accused, absence of confrontation with accusers without benefit of a single subpoena can dismiss all dismissals.]

Ex. JJ-3 (r. 28, 64): Subpoenas denied:

"9 November 1981

"Dear Mr. Waller

"Kindly inform Mr. Rubin that as head of the hearing office you have not received a copy of Dr. Joyce Sutton's statement, as he alleges in a letter to me, with copy to you.

"The following are the witnesses I

would like subpoenaed:

"Ms. Sharon Loris (civil rights specialist, Dep. of Dev. Serv.)

"Dr. O'Connor

"Witnesses I have not cross-examined before the court granted my petition for discovery.

From true copy of handwritten list (Exhibit xviii):

"Mr. Friday, Mrs. Owen and Heskett, Drs. Brannick, Jackson, Vaughn, Carnazzo, Gandhi, Hoheneck, Sutton

"Alice (hearing office secretary) has a handwritten list of all the names, which she kindly copied for me, and so does Mr. Rubin have one given him at court when the petition for discovery was heard.

"1 subpoena duces tecum for NSH personnel folders of parties and witnesses to this hearing. . .

[Mr. Rubin has free access to them.]

"I must again protest, as I did to the Executive Officer of the State Personnel Board, that delays in issuing subpoenas is detrimental to patients the doctors must inconvenience for purely procedural considerations. . .

"Their number will partly also

depend on the process of discovery which you assert the hearing itself is.

"Sincerely, despite overt disagreements,

"s/M.J.O.

Ex. SS (r. 21): Investigate conflicts?

"FOR YOUR INVESTIGATION

"TO : The Attorney General

"THRU: The Director of Mental Health (acting deputy director was on academic leave from UCD)

"FROM: Magno J. Ortega

"As Chief of Professional Education, I have served the State of California for a third of my life. During my tenure, at one-tenth less the cost at other centers, the alumni of our residency training program has consistently showed better than the national average pass rate for board certification in psychiatry. . . And from other sources than state taxes, we have a one-way vision room (for family therapy), a video studio and a computer to help us in psychiatric education and research. . .

"We had survived two surveys in tandem by a National Accreditation Board for Psychiatric Residency Training, which was prompted by the

past chairman of (a) neighboring university. . . Had the fine-toothed comb used by the hand-picked surveyor found us wanting, our residency training program would have been disaccredited and our funds up for grabs to compensate for our neighbor's lost federal funds and community-supported training in a sister state hospital.

"The pretext for the survey was that our residents have to commute to UCSF and SFGH. They overlooked that (UCD's) Sacramento General Hospital was further away. They made Highland Hospital and Mount Zion Hospital affiliations prime requirements, as well as (hospital) research. Research (did) need beefing up, even if the present (acting) university chairman's last two published papers were written jointly with two of our alumni.

"But now, oddly enough, we also have a tempest brewing in our teapot. The tempest, like hurricanes, has a name. It is called COERCION. Tempests have a way of throwing up dirty debris, and it is in this sense that I suggest investigation of the following. I hope it is not seen as washing dirty linen in public.

"I have worked well with all the medical directors for the past 17 years and until now, with all the clinical directors (before Mr. Donoviel) and business adminis-

trators (before Mr. Friday). Otherwise, I could not have accomplished more than prior and other educator-administrators in the civil service system. (Prior C.P.E. directed a joint Napa-Sonoma Hospital Residency Program.)

"Coercion No. 1 took the form of a Clinical Director's attempt, against the wishes of the new Medical Director (Dr. O'Connor), to exclude me from the Governor's briefing room when the doctors threatened strike action. He (Mr. Donoviel) asked me if I'd like to leave the briefing room to talk to him and I replied that we had nothing to talk about. . . At that meeting, I told the Governor that Asian resident trainees who had passed California licensure examinations but were not graduates of American medical schools were paid half the stipend of Caucasian doctors who had not taken those exams. He promised the inequity would be rectified and asked me to help qualify more doctors for state service. I have and the inequity disappeared by re-interpreting regulations (graduates of approved medical schools became applicants whom the state licensing examinations and I accepted from anywhere in the world).

"Coercion No. 2 shows the tip of the iceberg indirectly. The Business Manager (Mr. Friday) erased my name from the court-ordered parking space one night. A couple of years later,

when he thought the incident might have been forgotten, he handed me the spray paint can at a Christmas party. More recently, my car was given a parking ticket on a Sunday for stopping at the door to my office (in a separate wing from the hospital).

"Coercion No. 3 was when a non-Caucasian resident was refused quarters because she had a child. . . I put her up in my house 5 miles away until she could find lodgings in town. (The child was quiet as a mouse).

"(. . . Their fetish for silence backfired recently, when a tenant quietly died and was discovered only because odor assails the senses silently. . . No amount of management training can replace native talent for absurd decisions. . .)

"Coercion No. 4 was a joint effort by the Clinical Director and Business Manager during the Medical Director's absence. In the dead of night, they arranged for the copying machine to be moved to the furthest wing from the Professional Education Department. . .

"Coercion No. 5 was the Business Manager's refusal to honor contracts already approved in Sacramento (Cf. Exhibit 16b) and the purchase orders for accessory computer components already signed by the Medical

Director (Exhibits 13a,b).

"Coercion No. 6 was when the Business Manager insisted I not be allowed to finish a (Friday) case conference in order that the donation of the computer itself to the hospital can be further investigated.

[The special investigator assigned to Napa was going to be away on vacation by then, and the hospital can start the investigation itself. The Business Manager could not wait even that long and had the locks to my hospital office changed before office hours Friday morning.]

"I was alleged to have coerced contributors to donate towards the purchase of the computer. . . By my arousing their curiosity about a revolutionary tool in research instead of guilt over not having done more research, the residents contributed the equivalent of one to two days' pay on the understanding that if they spent holiday time laying their hands on the computer instead of patients, they would get compensatory time off, but not at the expense of their schedule,and subject to my approval. . .

"But I've perhaps opened my mouth once too often on learning that the hospital bus has dangerously thin tires and that replacement won't be forthcoming until Halloween. I suggested that the patient government will not hesitate to help out

if invited, even if the state does not mind delaying any outing to save the hospital from embarassment in case of accident. . .

"The Clinical Director had just reported attending a two-minute meeting of administrative echelons 400 miles from Napa. I hazarded that if the president of the patient government were invited, their pressing needs would be funded instead. An administrator (Mr. Friday's better respected assistant) agreed, and that was probably the last straw, for the Clinical Director (Mr. Donoviel) adjourned the meeting with 'Are there any other jollies?'

"I doubt with all my heart that Coercion Nos. 1 to 6 could have happened if I had been Caucasian. . . None profited patient or hospital. . . And the name of the game may be Conflict of Interest. . .

"s/M.J.O.

"28 Aug 81"

Ex. CCC (r. 14): Final Query (not plea):

"In Mississipi, blacks who register to vote were arrested for reckless driving through stop signs when none existed.

"Is Rule 131 that does not apply to any doctor the Napa version of a stop sign?"

"Must the hearing officer recommend the personnel officer for a reprimand for inefficiency and incompetence in citing the wrong rule in its notice of punitive action? Or for negligence with malice aforethought in padding the allegations?

"Should he also cite himself for accepting the charges unamended when it contains such gross error . . .?

"Can the board recommend to the Board of Equalization that damages be awarded to the victim of inefficiency, incompetence, negligence, malice and misrepresentation?

". . . Hobbes-like, bureaucrats assert:

"All power comes from the State, now that God is dead, and where there is a ruler (appointing power), he has been placed in his position by the State (God if it is king). Wherefore, whoever offers resistance to the ruling powers offers resistance to the State (the ancient crime of sedition, called heresy even earlier).

"The State (God) can take your sons into his army (crusades), he will take your daughters to serve him (as long as you don't 'harass' her), he will take your best olive fields (unmatched by any public hospital training program outside Kansas), and distribute them among his servants (academic bureaucrats).

"Thus, there are bureaucrats, theocrats, and aristocrats. The first is upheld by mediocrity, the middle by mediocrity and grace, the last by grace and excellence. . ."

[Rule 131 does not apply to Medical Residents and only requires that:

["In order to be compensable by cash OR compensating time off, overtime in Work Week Group 1 and in Subgroups 4A, 4B, and 4D must be authorized in advance, except in an emergency, by the appointing authority or its designated representative. This authorization must also be confirmed in writing not later than 10 days after the end of the pay period during which the overtime was worked. Each state agency shall maintain complete and accurate records of all compensable overtime worked by its employees."

[4C employees are not entitled to cash payment for overtime worked. Even staff doctors who go on night duty can only earn compensatory overtime. Residents who can only be assigned overnight work on Fridays in order not to be sleepy during training sessions can only add

their compensatory overtime to their vacation. because their schedule is always full. Witn a computer, future patients stood to gain at the expense of present assignments, and so they can only practice learning it on holidays. Since Dr. Ortega has established the priority of training even before night duty, no one has questioned his requiring residents to spend week-ends in training seminars without compensatory overtime. Do doctors in private practice charge their patients for attending Continuing Medical Education Programs, or can they charge more because they know more afterwards?

[Residents expect to earn more and are willing to sacrifice half what they can already earn as licensed physicians to become specialists.

["Coercion" had become "arranged for"

and back to "coercion" when the overwhelming evidence of the hearing was that the residents arranged to obtain the kind of computer they wanted, and to have it demonstrated to the other residents, and then refused to let Napa keep it before, during, and after the hearing.]

[Can this Court undo the damage that the State Personnel Board has done in refusing to refer to the Board of Equalization what the Court of Appeals decided warranted the award of damages?]

[The rest of the Notice of Punitive Action is equally absurd and hence not dignified even by the state who has omitted it from their Appendix. Residents (Cf. Exhibit E) agree and alumni (Cf. Exhibit P) agree.]

Ex. viii (r. 33, a. 26): 2nd delay:

"We (Napa) hereby request that the

hearing currently scheduled for February 19 be continued to some date the following week. . .

"s/Deputy Attorney General"

[What was arranged was to advance the hearing before written testimony was finished and to deny oral testimony by adjourning when NAPA's, now S.P.B.'s counsel refused to re-cross-examine.]

Ex. x-a (a. 15): Exceptions to S.P.B. "Findings" in "Proposed" Decision:

"1) "THE ABOVE DISMISSAL EFFECTIVE SEPTEMBER 22, 1981 AND APPELLANT'S APPEAL THEREFROM COMPLY WITH THE PROCEDURAL REQUIREMENTS OF THE STATE CIVIL SERVICE ACT." That statement is false.

"In fact, the Act mandates, under G.C. Sec. 18714 (Exhibit G), early and informal resolution of grievances and the establishment of channels (Ex. xiv graphic) for processing then (2 CAC 540-3) according to SPB's own rules:

"When the aggrieved reports to the same offical as the person against whom he has a grievance, that official decides and if he does not resolve the grievance to the satisfaction of both, they must be referred to the next official in

line (Exhibit N). . .

> "(Peon) asked that SPB refer his grievance to the Secretary before there were any written charges, but SPB ignored its mandate and (mis)interpreted the specific request for referral as an appeal to written charges which came on September 16, 1981. (Ex-peon) appealed directly to the SPB the same day by registered mail and (appeal) was received on September 21, 1981. But acknowledgement of his "appeal" was dated Sept. 18, 1981. . .

[The rest of Exceptions to Proposed Decision have been summarized in reply to petition for certiorari and supporting citations.]

Ex. xi-a (a. 36): Undocumented Decision:

> "June 1, 1982:
>
> "Enclosed is Volume V . . . Volumes IV and VI will be forwarded shortly.
>
> "s/Hearing Reporter"

[Why was the hearing transcribed out of chronological order?]

Ex. xv (a. 28): Exhibits in VII:192-8:

"xv-A (73): Stanford Professor and

Nobel Prize nominee:

". . .I want to state simply that I believe that the Napa State residency has become one of the very best in the State under Dr. Magno Ortega's leadership in the sense that his residents remain open, inquiring, and dedicated psychiatrists."

"xv-C-2 (8): Dr. O'Connor's ex-boss:

"Administratively, it is poor practice for an investigating body to recommend disciplinary action. Investigators should investigate and other advisers help decide what to do.

"With special investigators, I'd not want recommendations from him. I'd ask him for the facts he'd found, and ask others for recommendations."

xvi-c (a. 28): An alumnus, now peer:

"Through collaborative arrangements, 21 Department of Corrections Career Psychiatric Residents have been assigned to Napa State Hospital Psychiatric Residency program for psychiatric training for past 15 years. Under the directorship of Magno Ortega, M.D., the Napa Residency Program provided excellent training for the 21 Corrections Career Residents, who have become well trained clinicians and competent psychiatrists serving different

correctional institutions."--Dr. Luke Kim, Chief of Professional Education, California Medical Facility, Vacaville.

Ex. xvii (a. 40): Hearing premature:

"At its meeting on January 9, 1969, the State Personnel Board adopted the following policy on employee discipline:

"1. Appropriate positive corrective efforts such as training, performance evaluation, and counseling usually should be pursued before taking a punitive action. When corrective action is not successful, punitive action should be taken. In the absence of justifying circumstances, a severe punitive action should be preceded by less severe action or other positive corrective efforts. . .

"5. Punitive action should not be based on isolated trivial offenses. Such offenses usually should not be included as a collateral basis for punitive action taken because of a serious offense.

"6. The Board will NOT tolerate any burden upon the use of the appeal procedure. There MUST be NO reprisal or harassment of ANY nature, direct or indirect, expressed or implied, of employees for the exercise of their rights of appeal to the Board."

[Peon took S.P.B. policy as the ground rules for more than a decade, since they have not been revised, and cannot understand why he is now an ex-peon. Punitive action against him was decided before corrective action was attempted. Was there nothing to correct? The last straw (r. 27) may have been the photograph (Ex. 17). Dr. Sutton had been president of the physician's union opposite which Dr. O'Connor as state representative must now sit at the collective bargaining table. In fact, she got the Executive Secretary of the Union himself to come to Dr. Ortega's interrogation, at which his role was questioned and she was denied admission. But miscegenophobia was not perceptible as racial sexism until hearing officer saw Dr. Ortega arrive with another alumna carrying legal reference books,

when he visibly grimaced, probably involuntarily.

ORAL AND WRITTEN TESTIMONY UNDER OATH

Petitioners requested the United States District Court "to take judicial notice of the records . . . of the Superior Court . . . of California, County of Napa in the action entitled MAGNO ORTEGA v. STATE PERSONNEL BOARD No. 44526.

The volumes of the record will be designated chronologically, I to VII. The pages of cross-reference in the reply (r.), appendix (a.), motion (m.) to proceed in forma pauperis, and in affidavit supporting (s.) it will be enclosed in parentheses after the outdented pages/lines of the record, followed by statements/questions which can not be invalidated/nor unanswered.

Appendix-49

Folio I

(Hearing on Oct. 29, 1981)

I:2/1-9 (a. 14): Dr. Vaughn recalled:

INDEX

(Order of) WITNESSES	DIRECT	CROSS
FOR THE RESPONDENT:		
Elizabeth Reynolds	8	
Edith Elizabeth Morgan	12	23
Kay Ann Thompson	39	
Richard M. Vaughn	44, 97	59
Dorothy Owen	72	
William Carnazzo	80	

[As soon as cross-examinations of Mrs. Owen and Dr. Carnazzo were deferred, Dr. Vaughn was recalled without prior permission. Thereafter, Mrs. Owen and Dr. Carnazzo were beyond "recall".]

I:8/11-15 (a. 10): False first promise:

> Dr. Ortega: May I ask when you ask for weaknesses (sic) and I've no way of finding out how to defend myself against their testimony, can I recall them afterwards?

Hearing Officer: Certainly, you may recall any witness you want.

I:36 (a. 24, 28): Access again promised:

Dr. Ortega: . . . -- can I ask again, I can have the witnesses brought back?

Hearing Officer: Well, if it becomes extremely important upon an offer of proof but normally in an administrative hearing we finish with the witness at the time they're called so we inconvenience those people as little as possible. But yes, there's a distinct possibility if their testimony or continued testimony is necessary to call them back.

Dr. Ortega: Because as I have said earlier, my not having full discovery limits my ability to mount a defense, and if you are proceeding with me not able to defend my case, it's forming conclusions.

Hearing Officer: This is no such proceeding. We're attempting to determine all the facts in each case. If it becomes necessary to recall a witness we'll attempt to do so.

I:42/15 (a. 24): Third false promise:

Hearing Officer: Do you have any questions of this witness?

Dr. Ortega: (No audible response).

Hearing Officer: Apparently

not. Witness will be excused.

Dr. Ortega: I reserve the right to ask her back.

Hearing Officer: Well, if something becomes relevant at a later time you can assure me as to what reasons we would recall her and what you would like to ask her, then certainly that may be possible. We're not going to keep all these witnesses sitting around the hearing room, Dr. Ortega.

Dr. Ortega: I'm not talking about now. I have no way of preparing for her, for this, because this is new.

Hearing Officer: If it becomes necessary she can be recalled.

Dr. Ortega: I thought at the beginning we had agreed because I have not had full discovery, we will be able to recall any witnesses we saw now.

Hearing Officer: I don't think there was any finding you hadn't had full discovery. The question is, it may become appropriate to recall a witness and if we find it appropriate to recall the witness, we'll recall the witness.

The witness will be excused.

I:47 (r. 12, 54): Ex-con compelling?

Dr. Vaughn: . . . I was a frequent verbal critic of Medicade in the State of Virginia. . . And I placed them in a position that either bring

some charges against me and allow me to answer them or that I was going to bring suit against them, at which time they brought the Federal Government in the case and brought mail fraud charges against me, since certain of my billings were considered not appropriate and were delivered through the mail. . . I was tried, convicted, and sentenced to six years. And ordered to pay (costs and) make restitution. . . I organized a reading program and taught over a hundred inmates to read who were previously illiterate.

I:55/24 - 56/26 (r. 13): "Get Ortega"?

Dr. Vaughn testified on 10/29/81 that he waited while petitioners Mrs. Owen and Mr. Donoviel talked:

". . . He asked me if -- if I would allow him to proceed (sic) me in speaking to Mrs. Owens about five minutes, and I said certainly and so he proceeded me talking to Mrs. Owens. And then I went in and Mrs. Owens could not have been more polite, . . . and told me not to be alarmed; that they had a way of dealing with this and that I would receive my check in very short order."

I:79/13-25 (a. 14): Recall promised:

Mrs. Owen: I said (to Dr. Ortega) what you really should have

done if you were to do a punitive action (can't punish the unsure for being true to themselves), that he (Dr. Vaughn) was, you know, being insubordinate (reluctant to resume rotation), then it's not a leave of absence as requested by employee (notice did not say it was requested).

Mr. Rubin: I have no further questions of this witness at this time, Mr. Hearing Officer.

For purposes of organization, with respect to some of the other allegations in the notice, I will probably want to recall this witness on the other charges if -- I just think it will facilitate the organization.

Hearing Officer: Well, this witness of course is the personnel officer and she's going to be her for the entire hearing. So I think it would be appropriate in her case.

. . .

I:80/5-16 (r. 25): To AWAIT discovery:

Hearing Officer: Therefore it's granted.

Mr. Rubin: Thank you, sir. So at this time I have no further questions.

Hearing Officer: Dr. Ortega, do you have any questions of Mrs. Owen?

Dr. Ortega: I have a statement to make. If as you said this

(hearing) is the practice of discovery, because it is a fact-finding hearing, I do not want to participate, because it might mean I'm waiving my rights to full discovery. So have no questions (at this time).

Hearing Officer: You will be excused, Mrs. Owen.

Mr. Rubin: Your Honor, I'd like to call Dr. Carnazzo.

I:88/8 - 89/5 (a. 25): Access O.K.:

Mr. Rubin: No further questions, Your Honor.

Hearing Officer: Just a minute.

Do you have any questions of this witness?

Dr. Ortega: Same position statement. I don't want to waive my rights to full discovery by asking any questions (now).

Hearing Officer: Well, as I informed you earlier, administrative proceedings are in effect a discovery process. We're trying to find out what the facts are at this time. I don't want you to be misled in that you have some sort of valid reason for overturning these proceedings by not asking appropriate questions during the course of this hearing. If that's your intent, you should be advised that that's not a probability. This is the proceeding where we do discover what the facts are.

Do you have any questions? You should ask them at this time. This will be your only opportunity.

Dr. Ortega: He works here. There will be no inconvenience to him. The stake of my career is far greater than just simple inconvenience. So I beg to be excused from this procedure until the courts hear on the question of full discovery. The Discovery Act in California are very liberal and they were intended to be. And it is no one's decision except whoever needs it to decide what he needs. Unless it is privileged.

Hearing Officer: All right. Your position is clear. The witness will be excused.

[He was NOT "recalled" and when Dr. Ortega called Mrs. Owen as his witness, she was REFUSED. He was denied the chance to correct her testimony as indicated inside parentheses above, AND to unravel the threads of the conspiracy "to get Ortega".]

I:112/15-25 (r. 7): Documents withheld:

Mr. Rubin: So these orders then were not for the actual purchase of the computer itself; is that right?

Mr. Friday: That's correct.

Q: So you declined to process these at that time, is that correct?
A: That's correct.

Q: Was that because you felt that you couldn't authorize a purchase of a printer and other collateral equipment if the hospital did not have title to a computer itself? (Napa's Volunteer Services had one.)
A: That's right.

I:119/1-6 (r. 8): Contract was approved:

Mr. Rubin: . . . have alleged that Dr. Ortega submitted a contract for Mr. Saeedi to be paid a total of $1800 and we say that contract has not been approved; is that correct?
Mr. Friday: Is that the one for this fiscal year?

Q: That's correct.
A: Yeah. That's correct. It hadn't been processed.

I:122/1-5 (a. 16): Incomplete discovery:

Mr. Rubin: . . . There may be one, the policy directive on sexual harassment, which we only recently discovered which he might not have had at that time. I'd submit that there's no prejudice in that connection.

[Directive requires written report of

Civil Rights Specialist at every stage of investigation, none were produced. Court ordered that "all investigative notes" be furnished Dr. Ortega, but not a single one was ever produced.]

I:124/15-22 (a. 11): Another promise:

> Hearing Officer: Well, if it is possible to continue this to the fourth (of November), we'll continue it on the fifth, if that's necessary.
>
> Dr. Ortega: And I'll be permitted to present all the witnesses I need to make my case?
>
> Hearing Officer: Certainly we're not going to cut everybody short on time in the presentation of evidence.
>
> Dr. Ortega: Thank you.

Folio II
(Hearing on Nov. 16, 1981)

II:2/1-16, 5/10-18 (r. 21): re Skelly:

> Dr. Ortega: (Present petitioners) were instructed by Superior Court to show cause why discovery was not complete.
>
> Respondents (then) promised to have them mailed by the end of business that day.
>
> The next hearing was supposed to be on November 4th and 5th, 1981,

but the demanded documents (specified as the subpurchase orders) were not mailed as promised, and my witnesses had to be told the hearing was postponed -- by whose request I have not been told -- to 10:30 a.m. today, November 16th, 1981.

Some of my witnesses (Dr. Sutton, for one) have been threatened. Some of the residents' basic placements to meet California license requirements have been denied indefinitely.

Now I have the documents (missing sub-purchase orders) on which the charges are based, I demand a (Skelly) hearing without further delay, and it's 10:30, November 16th, 1981.

. . .

Hearing Officer Waller: . . . On the issue of the Skelly Hearing, Skelly Hearings are, of course, important and Rule 61 covers Skelly Hearings. But if there's actually no Skelly Hearing at all, the remedy is for the State Personnel Board to place a new effective date of dismissal, and I am not prepared at this time to rule whether there was or was not effective Skelly proceedings.

Therefore, I'm going to proceed with the hearing and that ruling will be made in the course of preparing the proposed decision for the State Personnel Board.

[Mr. Waller at lunch recess told Mr. Rubin Dr. Ortega did NOT have a Skelly

Hearing but Mr. Rubin argued that it will just mean having to start all over AGAIN. This hearing had ALREADY been pre-scheduled in disregard of Agency Procedures for Invoking discovery and then re-scheduled twice BESIDES. At the END of his proposed decision, Mr. Waller went along with Mr. Rubin: "During the hearing the appellant made repeated assertions that he was denied prehearing discovery. Those assertions are without merit. He was provided all relevant information and documents." He made NO reference to the contrary Superior Court finding.]

II:52/5-23 (r. 28): Subpoenas touted:

> Dr. Ortega: May I ask about the subpoenas for my witnesses?
>
> Hearing Officer: What we're going to do on subpoenas, Dr. Ortega, is that some of -- some of these individuals that you've requested to be present are actually state employees here at the state

hospital. So, there will not be a necessity to issue a subpoena. I'm merely going to ask the state hospital to have those people present.

Then the other people who would be requested on a subpoena, we'll give you a subpoena to serve upon them to give them adequate time and notice as to when we're actually going to listen to them.

In other words, I don't want people from, say, Palo Alto to show up pursuant to a subpoena and sit around all day when there's no chance of us to hear their testimony.

So when it becomes apparent their testimony is necessary and relevant and a time can be set for them to be heard, then we'll issue the necessary subpoena.

II:85, 86 (r. 51): Casual A.L. illegal:

Dr. O'Connor: . . . You were trying to get me to allow you to come back on the grounds the next day, and I wanted to make sure that you did not.

Dr. Ortega: Why not.

A: Because I felt it would seriously encumber the investigation.

Q: How?

A: By having you present with the residents and the other people that were concerned in this matter.

[Either Dr. Ortega was awesome as a mesmerist or the locksmith was also going on vacation and will not be available for investigators to get inside Dr. Ortega's locked DRAWERS.

[(Freud would find this funny: A healthy father may be curious about his daughter's diary, but not in his son's. Peers exaggerate in the locker room to defend against homosexual doubts, but also to indulge their curiousity about peer performance.)

[The residents saw through the subterfuge and there was an outburst which prompted the hearing officer to bare his heart: "These are public hearings only so long as the public does not become involved in the procedure."]

. . .

Dr. Ortega: In your consultation to arrive at that decision, what encumbrances would I have presented?

Mr. Rubin: Mr. Hearing Officer, I'm going to object. The question has been essentially asked and answered.

Hearing Officer: He stated he didn't want you there. I don't know. We could all speculate.

II:88/7-19 (r. 16): DUE process denied:

Dr. Ortega: I take exception to that because an administrative leave involves deprivationof property rights, and there must be procedures followed for doing that, and they're important. And it's important that they know what those procedures are. Without their being known, anybody can be deprived of income for capricious purposes.

Hearing Officer Waller: Do you want to respond?

Mr. Rubin: Yes, sir. If Dr. Ortega is under the impression that the procedures with respect to administrative leave were not properly followed, then he's free to file a grievance or bring a lawsuit for loss of salary or salary that has been properly denied him, but that matter is not relevant in these proceedings.

[It is especially relevant WHEN a token "routine inventory" is undertaken after legal consultation simply because of an

ex-con's speculation at great emotional and financial cost to his victim.]

II:100-102 (a. 6): "Routine" procedure?

Dr. Ortega: Did you authorize searching my personal papers.

Dr. O'Connor: After we had consulted with the attorney in the department, we felt that we could, indeed, go into state property, which was your office, and look into the state property.

Q: Did you look into my private letters?

A: Did I?

Q: Yes.

A: No.

Q: Did you authorize it?

A: I authorized people going into your office, yes.

Q: Looking into my private files?

A: Well, I don't consider those to be private files. Those are on state hospital grounds. They're supposed to be state hospital business, and I would say that I authorized people to go into the state office that you had occupied previously and look into whatever is in that state office.

Yes, indeed, I did that.

Q: And use my private papers?

Hearing Officer Waller: I

think he's answered the question.

Dr. Ortega: Could you use my private papers?

Hearing Officer Waller: The answer is he didn't consider any of the papers in that office to be private. That's why he authorized them to go through all of the papers that were there.

Now, if you want to prove something else later on, perhaps you can do that. I think we've covered that subject.

Dr. Ortega: One of the discovery papers that the court demanded was a photograph.

Did you know about that photograph?

A: Yes.

Q: When did you know about the photograph?

A: I'm not sure of the exact date on that. It was sometime during the investigation.

Q: Before I was dismissed?

A: Again, I'm stating I'm not sure about the exact date of that.

Q: Did you decide then that you would use it?

A: I am not sure what the question is.

Q: Use the photograph.

Hearing Officer Waller: I think that's Mr. Rubin's decision as to what he uses and does not use.

You can question him about that.

. . .

It serves no useful purpose to continue to talk to Dr. O'Connor about what he intends to use, or what he does not intend to use. It's not a personal matter between you and Dr. O'Connor is what I am trying to explain.

. . .

Reducing this to a personal conflict between yourself and Dr. O'Connor really doesn't serve any useful purpose.

Dr. Ortega: Mr. Hearing Officer, it is more than personal. This is constitutional.

[Was "I'm not sure . . . " a signal for hearing officer to testify? The question of "What?" is as important as "When?" in DUE process issues.]

II:103/19-24 (a. 20): No coercion found:

Dr. Ortega: And who were those who were complaining about having contributed?

Dr. O'Connor: I don't recollect as far as our investigation is concerned. I've never said that anybody complained except the one person that I just mentioned who had written a letter that, among other things, mentioned that.

Q: And he was the only one who

complained about it?

A: As far as I know. As far as the donations, that's correct. No residents complained to me about the fact that they had given money to the state hospital for the computer.

Q: And did this resident contribute to the computer?

A: I believe he stated in testimony here that he did not.

[The residents whom he criticized for contributing did NOT want his money.]

II:118/11 - 119/7 (r. 20-21): Rule 131?

Dr. Ortega (to Dr. O'Connor): Before you recommend punitive action, you must know what you're charging the person with violating?

Hearing Officer Waller: He's alleged that it's all here. I mean, we have to determine whether or not it's true and whether, in fact --

Dr. Ortega (to Dr. O'Connor): Separate from that, there must be laws that you allege to have been violated. Do you know what they are?

Mr. Rubin: I'll object.

Hearing Officer Waller: Objection sustained.

Dr. Ortega: Mr. Hearing Officer, is it your contention that the violation need not specify any laws?

Hearing Officer Waller: I'm not contending anything, Dr. Ortega. I'm merely trying to determine facts by listening to witnesses, and determine whether or not the allegations are true or false, and if true or false, what would be an appropriate penalty. They's my sole purpose of being here.

Dr. Ortega: For the record, I would like to state that it is unconstitutional to be vague about what one is accused of.

II:112/22 (a. 20, 22): Who was deceived?

Dr. Ortega: The question is: In all the time you knew me as Chief of Professional Education, have you been misled by me?

Dr. O'Connor: Only you know that.

II:114/11-20 (r. 8): When aggrieved?

Dr. Ortega: Isn't it a fact that before you placed me on administrative leave, we had not spent a half hour in your office?

Dr. O'Connor: I don't know that that's exactly right. The things that I recall are that you were in my office much more frequently over the last several weeks before you were placed on vacation than you had usually been in my office, because you were concerned about the contracts not being signed by Mr. Friday and were trying to encourage me to get Mr.

Friday to handle the contracts for you.

II:126 (r. 16): "Vacation" BY REQUEST:

Dr. O'Connor remembered: "You thought that it would not look good, in light of the university and so on, and you asked me instead of going on administrative leave, would it be permissible to allow you on vacation . . . for two weeks. . . I was initially talking about a period of about a week."

[Respondent NEVER envisioned invasion of private files inside his locked desk drawers; it continued after dismissal!]

II:143/8-19 (a. 25): Subpoenas refused:

Hearing Officer: Now, before we call the next witness, we should have some preliminary matters to discuss insofar as the hearing tomorrow. You have now been provided, Mr. Rubin, with the copy of the witness list that was made -- was given to me by Dr. Ortega.

Now, I notice that certain of those witnesses have already testified in this action. Certain witnesses have not testified, but are state employees who are employed at Napa State Hospital.

Perhaps you could make the employees of Napa State Hospital available tomorrow without the necessity of subpoenas so we could

continue this hearing.

II:150/16-25 (a. 39): Defy court order:

Hearing Officer Waller: Well, if he's going to testify from his notes, of course, they should be made available to the other side. If he can testify without looking at those notes, then they're certainly not subject to discovery.

So I ask you, Doctor, to state now, do you need those notes in order to testify, or can you testify from your own memory?

Dr. Laskay: I can testify from my memory.

Hearing Officer Waller: All right then.

II:167/20 - 171/7 (r. 17): "Forgery"?

Dr. Ortega: Do you know why, in these thank you notes, one is signed and one is not?

Mr. Rubin: I'll object to that.

Hearing Officer: I'm sure he doesn't know. Even Dr. O'Connor doesn't know, the man who was supposed to have signed them both. Perhaps when you testify, you will tell me.

Dr. Ortega: You did not, in fact, take this copy from my office?

Dr. Laskay: That is -- is this the one to Mr. Manshouri?

Q: Yes, without a signature.
A: That's correct. We found that in a file marked "Computer."

Q: And when you were asked, you were checking whether forgery had been involved? Do you recall that?
A: Not in regard to that document, no, we did not.

[Caught off-guard, denial disowned.]

Q: So, you were looking for instances of forgery?
A: Among other things, yes.

Q: And you are an expert in forgery?
A: No, I am not.

Q: Now, what were you going to do when you suspect forgery --
Mr. Rubin: I am going to object.

Hearing Officer Waller: The objection is sustained.

Q: When did you start suspecting forgery?
Mr. Rubin: I'm going to object to this, Your Honor. There's no indication that there's any forgery involved in any of the documents which are germane to this proceeding, and unless some foundation is laid with respect to this --

Dr. Ortega: I thought I did.
Hearing Officer Waller: Well,

he stated he's an investigator asked to invstigate this. I suppose if he found some forgery, he might have mentioned it.

So you might ask him first if he found some forgery.

Dr. Ortega: I wasn't listening.

Hearing Officer Waller: Ask him if, during the course of investigation, he found any forged documents.

Dr. Ortega: That was not my question, Your Honor.

Hearing Officer Waller: Well, I want to get right to it. If he didn't find any, then there's nothing to talk --

Dr. Ortega: Mr. Hearing Officer, you and and district attorney are asking me to conduct the hearing the way you would.

Hearing Officer Waller: Doctor, what I'm trying to do is keep you from asking irrelevant questions and continuing to go into long, tedious matters in a very repetitious manner.

Dr. Ortega: The witness testified that he was looking for forged documents.

Hearing Officer Waller: If I were investigating this, I would be looking for forged documents as well as everything else that went along with it.

Dr. Ortega: And my question is: When did he start looking for forged documents?

Hearing Officer Waller: All right. You may answer the question.

Dr. Laskay: There were two occasions on which this arose. The first one is when Dr. O'Connor himself did not originally recall signing anything other than the two sub-purchase orders. He later decided that that was his signature and he must have signed it at the same time that he signed those two sub-purchase orders.

The second issue-

Dr. Ortega: That's the first instance? He could not recall what he did that day?

A: He recalls signing the two subpurchase orders. He does not specifically recall signing the thank-you letters.

Q: Please continue.

A: And he had absolutely no recollection about the letter with the printer.

The second instance was when Mr. -- when we asked Mr. Saeedi himself about when he had indeed signed the contract to provide the training, and whether he had signed the individual invoices eachof the times he arrived at the state hospital.

He said that he did not recollect signing something at the beginning. He did not -- he stated

that he could not recall any specific details about it, and he said that he did not recall finding any invoices subsequently.

When we asked the secretaries themselves who handled the invoices whether or not Mr. Saeedi had signed them, they stated that they had witnessed him signing the invoices each time that they handed it to him.

At that point we dropped the issue.

[But not the investigation of fraud, since coercion cannot be established. Field investigation of Medi-Cal patient billings were pursued (Exhibit xxi) and inquiries about sexual conduct reached alumni who have already moved out of state. No information was worth paying anyone to testify with a free trip to California, and so the charges were padded.]

Folio III
(Hearing on Nov. 17, 1981)

III:1/19 (m. 1): ILLEGAL appointment:

Dr. Ortega: How long have you been Medical Consultant?

Dr. Laskay: I was actually appointed on a permanent basis beginning Oct. 1st. I was appointed on a limited term basis on June 1st, and I've been practicing since Nov. 15th of 1980.

Q: So, you have been acting for how long?

A: In an acting position almost a year. It's been a year.

III:6/23 - 8/15 (a. 15): Who complained?

Dr. Ortega: What prompted investigation about sexual harassment?

Dr. Laskay: I received a letter -- first I received a communication stating that an individual wished to talk to us about the matter of sexual harassment.

Q: And this individual was who?

A: Dr. Elizabeth Reynolds.

Q: That is not in the statement in discovery.

Mr. Rubin: Just a moment. I'll object.

Dr. Ortega: Never mind. We'll

introduce that particular document later.

Q: So, that was the start of it?

A: Yes.

Q: And then you proceeded to ask residents whether they slept with me?

A: I never asked a resident if they slept with you.

Q: What did you ask them about sexual harassment?

A: The question, I believe, was always phrased, "Do you ever recall having been harassed in a sexual manner by Dr. Ortega?"

Q: You never asked them if they had sex with me?

A: I do not recall ever asking any resident if they had sex with you.

Q: On the telephone to someone who was on vacation?

A: Not on the telephone.

III:9/7-13 (a. 20): No coercion found:

Dr. Ortega: You also investigated the computer?

Dr. Laskay: That's correct.

Q: And the person who complained about being coerced, wasn't he someone you referred for training in the program?

A: I do not recall any of the

residents saying they had been coerced. That was not the charge.

III:10/21 - 11/9 (a. 14, 25): Relevant?

Dr. Ortega: Dr. Carnazzo.

Hearing Officer: He's already testified.

Dr. Ortega: Yes, but that was before I had discovery, and you had agreed we could cross-examine those.

Hearing Officer: Mr. Rubin?

Mr. Rubin: That is a total fabrication. As I indicated on the record, when we went to court, there was no additional discovery ordered with the exception of the materials that we had volunteered to produce since it had appeared as a recent development that some additional materials would be relevant.

[Thus, Exhibits 17-19 which were STOLEN from respondent were NOT RELEVANT until after the investigation was all over. Furthermore, Exhibit H is court-ordered discovery of sub-purchase orders that were testified to but not produced in evidence on the first day of hearings.]

III:11/23 - 12/14 (a. 11): Repudiation:

Hearing Officer: (To Mr. Rubin) Your objection will be

sustained. We're not recalling any witnesses who have already testified.

With that ruling, go ahead and complete your questioning.

Dr. Ortega: I object because there was a clear understanding that we can proceed because the witnesses willbe inconvenienced otherwise.

Hearing Officer: If there was a clear understandig that those people's further testimony wasn't necessary after you had completed some form of discovery, then they may be recalled.

Apparently, that's not true. You were given full discovery. You were given an adequate opportunity to question those witnesses. They will NOT BE RECALLED. (Emphasis added.)

[Even Mr. Friday, also co-petitioner, -- who testified about sub-purchase orders WITHOUT producing them -- was NOT subpoenaed, though the documents negating his testimony were ordered produced by court.]

III:20/24 - 21/12 (m. 1, r. 29): Empty:

Dr. Ortega: Now, in your investigation, did you come up with anything then?

Dr. Laskay: At that time?

Q: Yes. When you questioned me.

A: I had had the discussion already with the one female resident.

Q: And that was the only one you had?

A: At that time, that's correct.

Q: Right. What matters did you drop after that questioning?

Hearing Officer Waller: Well, here again, the main instance is not the investigation. The problem is: What's been alleged, and can it be proved or not proved?

I'm going to go ahead and excuse Dr. Laskay. I think he's testified long enough.

III:21/13 - 23/19 (r. 29-31): Illegal:

Hearing Officer Waller: Is that the last witness you had?

Mr. Rubin: Yes. That concludes our case.

Hearing Officer Waller: Well, then, I'm going to suggest to you that you call Dr. Ortega as an adverse witness, under 776, so we can actually find out what the issues are in this case. Then we can go ahead and proceed in an orderly manner without groping for facts and statistics.

[Is this to force self-incrimination by

another interrogation when the other came up empty? Can Dr. Ortega testify and represent himself at the same time? If he did, will it force a recess? If he did not, will he be asked to testify BEYOND earshot?]

III:21/23 (a. 20): "Arrogance" charged?

> Dr. Ortega: I do not want to do that. I should be permitted to present my own defense. If I have not testified, you can not call me as an adverse witness.
>
> Hearing Officer: We're going to have you called as a witness, and we're going to identify what are the real issues in this case. We have broad boundaries in the discretion in an administrative hearing.
>
> Dr. Ortega: I don't think you have that discretion.
>
> Hearing Officer Waller: I don't care to argue. You'll be called as a witness and sworn.
>
> Dr. Laskay, you'll be excused.

III:39/8 (r. 9): Incomplete discovery:

> Mr. Rubin: Now, just so I understand your testimony, Dr. Ortega, you're testifying that the contract with Mr. Saeedi which is referred to in this Notice of Punitive Action, was, in fact,

approved and that you saw a copy of that approved contract, is that your testimony.

Dr. Ortega: Yes.

Q: And you've also testified that you will produce that copy?

A: No. I said I saw such a copy. The copy should be around if it is approved.

Mr. Rubin: Mr. Hearing Officer, I believe that he did testify --

Dr. Ortega: I'll make sure we produce one if I have to go to Sacramento, if it is that important.

Mr. Rubin: All right. I would then request -- formally request that that document be produced.

Hearing Officer Waller: He's stated he would produce it.

III:44/20 - 45/16 (a. 23): "Abrasive"?

Hearing Officer Waller: Now, this might be appropriate for a hospital worker who may indicate that they don't understand what's being discussed, that they don't understand the question, that they don't understand the issues, but it certainly is not impressive by a person who is Chief of Professional Education.

So I'm going to recess this hearing at this time for fifteen minutes. I'll let you consider your position in this case, and then we will resume the questioning.

Dr. Ortega: May I ask a question before we recess?

Hearing Officer Waller: Yes.

Dr. Ortega: The standards you have announced, are they somewhere written up?

Hearing Officer Waller: This is the typical question that I wish you would reconsider and actually try to put your best foot forward and present your side of the case rather than just a total argumentative stance.

Dr. Ortega: Mr. Waller, I try to save him some time. He won't let me.

Hearing Officer Waller: This hearing will be in recess for fifteen minutes.

[But too late to coach Mr. Rubin who declined offer of an earlier recess.]

III:47/21 - 48/9 (a. 24): Surrendered:

Mr. Rubin: During the recess, I had an opportunity to confer with some members of the hospital administration here, and we were puzzled by Dr. Ortega's testimony that he had seen a signed copy of a contract. We think we know what he might be referring to. It is not a signed contract, but this may have misled him slightly.

The actual notice at the back of that exhibit, the document I

brought to your attention, is not signed by anyone.

Now, I have a copy which I will introduce into evidence which has a signature of a department official in Sacramento on the request to initiate a contract and it my be this signature on the request to initiate a contract which misled Dr. Ortega.

[Dr. Ortega had been dealing with such contracts for 17 years, LONGER than anyone in the hospital administration.]

III:62/7 (a. 58): Computer was secured:

Mr. Rubin: So, you didn't have ownership personally of that computer, isn't that right.

Dr. Ortega: No, never.

Q: Now, to your knowledge, did that computer ever acquire a hospital number as part of the hospital's inventory of equipment?

A: No, never.

Q: But you placed that computer on hospital property, didn't you.

A. Yes.

Q: Did you ever --

A: So is my car on hospital property.

Q: Did you ever process this donation through the property

department of the accounting office of the hospital?

A: Neither Dr. O'Connor nor I know what those procedures were.

Q: So, I take it then that you never did process it that way?

A: Yes.

[Thus, only WHAT HAS BEEN SO PROCESSED IS HOSPITAL PROPERTY, e.g., a desk, but NOT its CONTENTS until also processed.]

III:69 (r. 10): Stanford is important:

Mr. Hearing Officer: I think the question to you, Dr. Gonda, is: Is the residency program at Napa State Hospital linked in some way with Stanford, and if so, how, and what's your connection with it?

Dr. Gonda: Yes, it is. It's linked with us in several ways.

Number one, we have members of our faculty who are consultants that come here and lecture on a regular basis. That is, each individual doesn't necessarily come on a regular basis, but members of the faculty come on a regular basis.

We have also made provisions for residents from Napa to take special training in aread of their special interest if we have those aread of interest represented in Stanford. Our work connection is both ways.

III:71 (r. 10): Work done not an issue:

Dr. Gonda elaborated thusly: "At that time (1964) we had many more State Hospitals than we do now, and it was in conjunction with this that I set forth a program with the Chiefs of Professional Education that, Number One, would educate the people who are already there and not specialists in the field at the various State Hospitals and, Two, that the Professional Education Chief would also attempt to work out the very best possible residency programs.

"I just had a brief look at that, but if my eyes weren't deceiving me, this is almost -- it's very difficult to believe the tremendously high percentage. If I am interpreting this right, these graduates, alumni it says here, of the program here at Napa State Hospital, and I would venture to say that well over 80 percent of them are in full-time practice as staff psychiatrists in either a State Hospital or a correctional facility. I didn't even dream a result like this."

Hearing Officer: Perhaps it would help the record if you would state what your position is at Stanford.

Dr. Gonda: Currently, I'm the Chairman of the Department of Psychiatry and Behavioral Sciences. . .

III:74 (r. 60): Trumped-up charges:

> Hearing Officer: . . . although it states on the very beginning of the punitive action that part of this cause for dismissal is inefficiency, there are no specific allegations of inefficiency in the performance of hospital duties except insofar as you could relate not submitting the proper documents concerning the computer and that type of thing with inefficiency.

[All documents were, including optional feasibility study, there and in order. Mr. Friday delayed computer consultant contract and Mrs. Owen revoked ex-con's legal leave without authority.]

III:81/24 - 82 (a. 30): Uncorrupt power:

> Dr. Ortega: What I suggested to you was not something that you would have done?
>
> Dr. Sutton: No. What Dr. Ortega is referring to is the fact that he -- his assignment of me to the California Medical Facility at one point during my residency resulted in a great deal of professional and personal growth for me. That requirement ultimately resulted in my career choice of correctional or forensic psychiatry.

Basically what happened is I was frightened of physically violent patients during my residency, and in order to deal with the patients, you can't feel that way. So, I was assigned to the California Medical Facility to a program that was set up to deal with violent patients.

As a result of that, I overcame my fears and became rather interested in it and chose to work at California State prisons upon my graduation. I say this because it says a lot about Dr. Ortega's style of handling problems. Basically, he does an excellent job. He promotes the professional and personal growth of residents, many times through assigning them on rotation to areas where they often don't want to go because he feels it is good for them. At least in my own case, assignments of this type I found to be helpful, even though at times I resisted them.

There is another assignment which I resisted during my residency. I had no liking for psychoanalysis, and he felt I should have exposure. And out of that rotation, even though I fought it all the way, I also grew professionally . . .

III:90 (r. 26): Support to be inhibited:

Dr. Sutton: . . . I was rather infatuated with Dr. Ortega.

Mr. Rubin: Did you have sexual intercourse with him?

A: No, I never did.

Q: You never did?
A: I never did, and Dr. Ortega always treated me with respect and decency. He never took advantage of my feelings of attraction towards him.

Q: Did he ever kiss you?
A: Yes.

Q: Has he ever embraced you?
A: Yes, but not in a sexual fashion, in an affectionate fashion, almost the way you might kiss a child.

Q: All right. Is this a photograph of you?
A: Yes, that is. That was taken in a photo studio by a professional photographer.

Q: And did you send this to Dr. Ortega?
A: I probably did. I don't have a specific recollection of it. There were many photos taken of me during that time and subsequent years. . .

Q: Dr. Sutton, my question was: Did you send it to Dr. Ortega? That was the question. What's your answer?
A: I don't know if I sent it or I gave it.

Q: But you delivered it into his possession.
A: Yes, I'm sure I did.

Mr. Rubin: I'd like to introduce this as our next exhibit.
Dr. Ortega: Objection.

Hearing Officer Waller: Well, there again, it has very limited relevance, but as long as we are off on this tangent, it will be marked Exhibit 17, and it will be admitted.

[How it is EVEN TANGENTIALLY RELATED to the work Dr. Ortega does is left open.]

III:110/6 (r. 10): Breaking UCSF link:

Dr. Ortega: So, why was your payroll check held up?
Dr. Metcalf: Well, that's what I wanted to ask the administration, and I did ask the administration.

Q: What did they say?
A: They said they needed to account for my time. Since I was paid two-fifth time, they wanted to know what I did with sixteen hours a week.

Q: And before that happened, why was there any reason to look into that?
A: Well, there never had been any reason to look into it before, but I was presented with that reasonable request. I objected to the way the request was couched, but I think it's a reasonable request.

Q: How was the request couch-

ed?

A: I received a letter saying that they had to have that information and that my check was being held up and had already been held up for several days until they got that information.

Q: And before that you were asked to participate in an investigation?

A: Yes.

Q: About me?

A: Yes, I was contacted by telephone.

Q: By whom?

A: Dr. Laskay.

Q: Can you tell us what happened?

A: Well, I got a telephone call at home, and I don't remember -- I'm thinking back on it, whether it was a week-end or not -- but it was about 9:00 in the evening, and Dr. Laskay said words to the effect that he would like to know if I had had any difficulty with Magno Ortega.

III:122 (a. 28): Director from 1964:

Q: In all the time you have known me, have I deceived you?

A: Not that I am aware of.

Q: Did my --

A: You irritated me at times, but never deceived me.

Q: Did my department change during that time?

A: Yes, it grew considerably.

Q: While the hospital was shrinking?

A: While the hospital was shrinking, and I will say that I always admired you for that, that you were able to maintain this residency program under the opposition of the Department of Mental Health in Sacramento.

In fact, as far as I know, you were the only one that maintained an accredited residency program in a State Hospital in California.

III:126 (a. 37): Director, now staff:

Dr. Ortega: Did I ever bring discredit to the hospital?

Dr. Spratt: Not that I am aware of.

III:131 (a. 30): Ex-Resident, now staff:

Q: Dr. Jackson, without any prompting on my part, you came to me and said you knew what I was doing about the contributing. What did you tell me?

A: I don't know if I was so bold to say I knew what you were doing, but I knew that I -- that the one thing I thought the overall effect was that the investment of time and money and that the level of attention and involvement in the computer would be heightened, and

that if a computer suddenly appeared, it would probably be treated with some disinterest unless there was an active involvement and interest on the part of the residents.

This was, I think, an effective way of heightening and making some kind of an investment in it in either time or money.

[Ex-trainees could receive TWICE as much working as learning. But even after his installment check bounced while a resident, he made good on his promise to pay for the computer they needed for training.]

III:137 (r. 5): UCSF feasibility study:

Dr. Ortega: You had told us, in fact, that we needed a series of equipment, but not -- but having the equipment will not be the answer if we did not have exclusive use or first claim on the computer, is that right?

Dr. Callaway: (Witness nods head.

Hearing Officer: You'll have to answer audibly.

A: Can I answer the question as something to that intent. I'm not exactly sure of the words.

Q: And that you recommended it

be used primarily for teaching and research because it could be totally usurped by library and clerical services, something to that effect?

A: We discussed that. Exactly who thought of that problem of usurping first, I'm not sure, but I certainly agreed with that.

Q: And in your work with the residents, it would be important to have a modem and timer for the computer that's here in the hospital, is that right?

A. A modem and a timer.

Q: Right. That's what I mean.
A: Yes.

[The wording of the thank-you note for the printer left NO room for business take-over or donation of equipment.]

Folio IV
(Hearing on Dec. 30, 1981)

IV:3-7 (a. 8): Indecision pretended:

Hearing Officer: . . . (T)his is the time for the presentation of Dr. Ortega's case. He indicated he wanted to immediately recall Dr. O'Connor and Mrs. Owen. Mr. Rubin indicated he was going to object to that procedure, and I made a statement that Dr. Ortega insisted go on the record. And that is that we'll hear from his witnesses first and his testimony, -- (can Dr.

Ortega be "recalled" and by whom? objected to on V:95, answered on V:96) -- we'll complete his side of the case -- (to see if "recall" will outweigh adverse testimony so far) -- and then we'll separately consider whether or not any of these witnesses that have previously testified should be recalled.

Do you have anything further you would like to add to that, Dr. Ortega?

Dr. Ortega: Yes. I think this is unfair, I think there are precedents to show that a party can ask for his witnesses without being bound by the fact that they have been called by the adverse party before. As you will remember during Dr. O'Connor's cross-examination you limited him to what Dr. Rubin -- Mr. Rubin, wanted him to testify about and he only wanted to testify about one allegation in fact. I think I should examine him about directly what other matters besides those since it is on his authority that I'm being dismissed. . . . He was a resident in my program, and I think what has happened between then and now are of relevance. . .

Hearing Officer: You wish to comment before I rule, Mr. Rubin?

Mr. Rubin: . . . I would very strongly urge that you not permit this to be undertaken, and WE are confident that this record will stand up in any further judicial proceedings if that's necessary. And we're satisfied that . . . you have done everything you could to protect his rights, to give him every opportunity. And as I, say we're confident that should WE be called upon to

defend that at some subsequent proceedings, that the record is clear he's been accorded every possible protection.

Dr. Ortega: Mr. Waller?

Hearing Officer: Well, I'm not going to rule finally on that issue of recall at this time. I'm going to adhere to my original ruling this morning and that is that we will not recall witnesses at this time. . .

Dr. Ortega: I think it is a mistake to think of it as recall, because they have been called once, but called by their own Counsel. I'm calling them for the first time, so this is not recall.

Hearing Officer: Well, I don't care to discuss that issue further at this time. We'll discuss it, as I said, later before we close the proceedings. If you have other witnesses or wish to testify yourself, let's go ahead and continue, Dr. Ortega.

Dr. Ortega: I take exception to this because this really turns my defense backwards.

IV:40/14 - 41/18 (r. 13): "Get Ortega":

Mr. Donoviel himself testified on 12/29/81 that "I suggested that Dr. Vaughn go directly to Mrs. Owen about his complaint of not being paid for I believe it was a month's service. And that event, that package, tripped off further comments about your conduct and that led to the investigation."

[Hearing reporter omitted "deal" after "package".]

IV:19 (r. 8, 21): Second to Mr. Friday:

> Dr Ortega to Mr. S: How is the contract approved?
> A: It's approved both locally and at headquarters.
>
> Q: What happens if it is not approved locally?
> A: Then it remains unapproved and to my knowledge you would have severe problem.
>
> Q: What happens if that disapproval was protested?
> A: Well, I believe then there would be a meeting of the minds between the protester, the reviewing party probably at headquarters and the person that needs the consultant.
>
> Q: So you'd have a three way meeting at least?
> . . .
> A: I would -- am speaking from my other case. I would assume there would be this, yes.

IV:20 (a. 10): Dr. Ortega "recallable":

> Hearing Officer: "Well, I assume you can testify to that if you have personal knowledge of it at the time you're recalled, if you wish to further testify" (about all

contracts being required to be transmitted with all recommendation, and never held up because of doubts).

IV:21/24: Purchasing uncertainties:

Dr. Ortega: You (Mr. Friday's second in command) are also a member of the Clinical Executive Committe?

A: I am.

Q: And at one meeting were asked about the expected delivery of hospital bus tires. Do you remember that?

A: Yes.

Q: And this was the middle of summer and the delivery date was after Halloween; is that right?

. . .

A: I said I wouldn't be surprised if they didn't show up, you know, until Halloween. But I was surprised, as often is the case, because the tires had been ordered and the process cleared and things did arrive and (patients) were able to go to the fair.

Q: And we also talked about getting patients involved in those outings. Do you have any reservations about getting them involved in any way?

Mr. Rubin: Mr. Hearing Officer, I'm going to object to this question. It's not relevant to anything. I should have objected to the question concerning bus tires,

but it slipped by. No, I'm going to -- this is clearly irrelevant.

Hearing Officer: Be sustained.

[In fact, involving the patients was the last exchange in the Clinical Executive Committee meeting chaired by Mr. Donoviel, where he reported on a recent wasteful junket when there are funding priorities that face uncertain futures. That just happened to be Dr. Ortega's LAST clinical executive committee meeting before being placed on UNPAID administrative leave.

[Dr. Ortega asked the group whether patients would CHIP IN and get tires instead of being cooped up inside hot day rooms to forego the risk of a blowout on the road on their way to the fair. He also mentioned it to the Attorney General and invited him TO INVESTIGATE possible conflicts of interest. Ex. SS.]

Dr. Ortega: Why were you not one of the investigators?

Mr. Rubin: I'll object to that.

Hearing Officer: Sustained.

IV:54 (r. 10,25): First year resident:

Q: Do you remember meeting with Dr. O'Connor at the start of the investigation?

A: Yes.

Q: Do you remember his mentioning that the person who started it stipulated that if the administrator did not look in his complaints, State investigators would be called in?

A: Yes.

Q: Do you remember Dr. O'Connor talking at great length about his experience under my directorship?

A: Yes, he had mentioned that he had come here because of your -- the novel way you had let him interview the patients during his application time.

Q: And he had been accepted in many other places?

A: Yes.

Q: Do you remember his talking about some unhappiness he had also?

A: I think he mentioned about your telling him to go to Mt. Zion for (rotation) and he was not happy about it because of the commute or

something but after going to (rotation) he was glad he had gone through it and it had helped him pass the boards. (Reporter heard "meditation" for "rotation" both times!)

. . .

Q: Do you remember seeing Dr. Vaughn the first day of your orientation in July?

A: Yes.

Q: Do you recall my telling him he should be in Highland?

A: Yes.

Q: At the meeting with Dr. O'Connor did that resident worry about reprisal?

A: Yes.

Q: Did he worry because Dr. O'Connor was oh, so positive that all would turn out well?

A: Yes.

Q: Did Dr. O'Connor answer him that Dr. Ortega was not that type of a person?

A: Yes.

Q: Were you told by the same resident(s) after the meeting to expect questions about sexual harassment?

A: We had gone from the meeting with Dr. O'Connor. We went to our usual conference room and were discussing about the investigation. I men the -- your leave, and he ha said expect questions about -- "I've

something else for you" he said. He told us and said expect questions on sexual harassment.

. . .

Q: While all this was happening none of you could see me; is that right?

A: Yes, we had received a memo that we could not see Dr. Ortega during office hours.

Q: And yet you are not on a 40-hour week, are you?

A: No.

Q: Did Dr. O'Connor reassure the residents that UC Davis would not take over the training program?

A: Yes.

Q: Has there been a significant increase in sick leave since my dismissal?

A: I don't know.

Q: I have to ask these questions. Did the Hearing Officer accuse me of harassing him and pounding the table on the first day of the hearing?

A: Yes.

Q: Did he promise witnesses will be returned for Cross Examination?

A: Yes.

IV:68/26 - 69/26 (a. 30): Leadership:

Dr. Ortega: Would it be fair to say you know me better than the

residents who have testified so far?
Ex-executive: Yes.

Q: Would it also be fair to say I know you better than I know them?
A: Yes, I think so.

Q: When you met with Dr. O'Connor, and he talked about having to go to Mt. Zion, did the same thing happen to you?
A: Yes, a very similar situation occurred for me in April 1981.

Q: What makes you think I can insist on that?
A: Well, I've -- I have spent some time as I've been here trying to, you know, figure out how these things work because I think it's quite informative to a psychiatrist, and it seems tome that at least a good part of it is rather indepth and intense study that you make of each one of us to the point that you feel that you know us very well. And I think that you do. So, you know our strengths and weaknesses and areas where we might do well to have additional training or where we might excel and add to our knowledge and ability as psychiatrists. I think Mt. Zion especially to work in the crisis clinic was, there was an area where you thought that I would both do well, and gain a great deal of pertinent experience. You did insist that I do that and gave me a very clear ultimatum so to speak

which I had no difficulty understanding that either continue with that rotation or quit the residency.

Q: Why didn't I offer the same ultimatum to Dr. Vaughn?

A: Well, it's a matter of my opinion about it is that my -- that you would not feel Dr. Vaughn could tolerate such an ultimatum. In response to it you had characterized me as -- as defiant at least at one point and I think that's probably accurate.

[He was correct about Dr. Ortega and Dr. Vaughn. In fact, Dr. Ortega TESTED Dr. Vaughn and found he could tolerate physical stress (losing all, repeat all, the big points in tennis) BETTER than being away from his wife.]

Folio V
(Hearing on Dec. 30, 1981)

V:10/10 (r. 9): Supporting decisions:

Dr. Ortega: If your business manager had not tried to obtain approval for training contracts routed through him in the use of computers, would you tell him to do so without delay.

Dr. Clanon (ex-director of correctional facility): I guess it

would depend on the circumstances. Depend on the circumstances. If he was negotiating, certainly I would. If he was negotiating to do something that he should have been doing.

Q: How would you determine that?

A: Disputes of that kind were not uncommon between business department and other departments. Or misunderstandings, disputes and so forth and I guess the most common way I would resolve that is to tell the business manager and department head, the two people involved, to meet and then come tell me or give me some understanding of what the disagreement was or else resolve it.

Q: And if it was unresolved?

A: Well, then it's my job, it was my job to resolve it, basically, to make a decision.

Q: Would you call both of them?

A: Yeah, usually I would. I would have both people. I would meet with both people at the same time and we would discuss it and so that both understand; whatever the decision was it would be understood by both of them.

V:13/28 - 15/14 (r. 7): Poor management:

Dr. Ortega: Or would you instead initiate an investigation of administrative practices in pro-

curement of data processing equipment and training by your Department of Education and Research?

Dr. Clanon: No, I -- you know, I would not. It was such a common occurrence in my experience that people would submit inaccurate or improper kind of requests for equipment out of -- usually out of ignorance of what was required that no, if I had taken each such instance as evidence of some misconduct, there would have been a lot of investigating. The usual, as I have indicated already, the usual response that was appropriate to that kind of thing was to get the department head and the business manager to sit down and communicate about what was going on.

Q: You have some understanding of what has happened and the reason why this hearing is taking place. Do you have some thoughts you would like to share about how it could have been headed off?

A: Well, I don't know that I have a full understanding of or all information about this hearing, but what understanding I have is that a primary charge against youis that has todo with this -- this -- some misconduct in relation to purchasing or attempting to purchase some accessories for a computer. And that there are several factors involved. One has to do with some question about coercion and -- of the residents to contribute money to purchase this thing, the original

computer, and secondly some improper things done to purchase, through the State, accessories for the computer and contract for training in the use of the computer, so forth.

You know those things sound, as I've indicated in the answer to the previous question, what I know about that, suggests to me that an action for dismissal of you and under an apparently unfavorable kind of condition, does not seem appropriate to me. It seems to me that, as I've indicated that that -- that, you know, the knowledge of how to comply with regulations, purchasing regulations, that change yearly and sometimes more often than once a year and are not communicated to people in positions such as you, is not an -- is not a, may be a cause for some supervisory action and may even be a cause for some disciplinary action in some cases, but not -- not of -- not of dismissal.

V:18/10 (r. 51): When is A.L. needed?

Dr. Ortega: In a setting like yours where security is more sensitive, when does it become necessary for some one to go on administrative leave?

Dr. Clanon: Well, usually it would be a situation where their presence in the institution or their continued discharge of the duties of whatever their job was, you know, would pose a threat of some kind to security. The, you know, to get more specifically to what I know

about the facts of this case,I don't know of any aspect of this case that would have led me as a superintendent to place you on administrative leave. You know, pending the resolution of a pending disciplinary action.

V:28/3 (a. 24): How do you treat talent?

Dr. Ortega: Do you remember when you first came to Napa?
Dr. Magbitang (last Chief Resident): Yes, what about it.

Q: Do you remember being so shy?
A: Yes.

Q: And stuttering when you had to criticize somebody?
A: Yes.

Q: But succeeding eventually in fighting for minorities in Sacramento?
A: Yes.

Q: And being lionized in Stanford?
A: Yes.

Q: Do you remember when you were an intern and you lost 20 pounds and you came tome, and instead of reducing your work load, I gave you some of my private patients; a family that I was seeing?
A: Yes.

Q: Do you understand why? How all this happened?
A: Which one?

Q: How it is possible for you to get over being bashful?
A: Well, I think you forced me to my limit and drew out all my potentials. And that's -- I didn't know I had those potentials and you drew it from me.

[From her GENES, her grandmother was a self-made millionaire, her grandfather the governor of their province.]

V:35 (r. 11): Budget coveted by U.C.D.:

Dr. Linn, Dr. O'Connor's ex-boss as hospital director, testified on Dec. 30, 1981, about the then UCD Director of Residency Training:

"Well, I do recall one incident at, when he was working for University of California at Davis, involved with obtaining funds for their training programs that he admitted to me that informally that his main purpose was to obtain sufficient money from residency programs throughout the State to keep his own training program going."

V:41/14 (r. 42): Dr. O'Connor's ex-boss:

Dr. Ortega: . . . If from what you have gathered in the way these things are happening about the

computer, would you have instructed the business manager to approve the training contracts?

A: I believe I would, yes.

Q: And purchase accessories for a computer used for training and research in the Department of Professional Education?

A: I think so, yes.

Q: If the computer was alleged to have been purchased because of coercion on the basis of coercion of contributors who happened to be the residents, would you investigate the Chief of Professional Education?

Q: An allegation of that sort would be a very serious one and would certainly merit looking into, yes.

Q: How would you proceed?

A: If there are still special investigators present at -- in State service as they were when I was the director, I would assign that investigation to that individual.

Q: Why him?

A: Because his training is in criminal type investigations and this is an allegation which is very close to a criminal allegation here.

. . .

Q: If you did not have a special investigator available, what would you do if an investigation is necessary.?

A: Well, I would obviously try to choose the most unbiased group of

individuals that I could find. One who had, perhaps from another hospital that had no connection with any of the parties involved.

V:53/19 (a. 19): Ex-con not supported:

Dr. Ortega: And you had your orientation with other residents who came after you in July?
Second year resident: July 1st.

Q: Do you remember seeing Dr. Vaughn come tc the first day of orientation?
A: Yes.

Q: Do you recall my telling him he should be in Highland?
A: Yes, because you said it in a loud voice.

Q: And you had met with Dr. O'Connor after I was placed on administrative leave?
A: Yes. We -- I learned about it Friday morning when I came to work that you were gone. We we got the, I think the memo that we have to ask for, we were to meet with Dr. O'Connor for the following Monday.

Q: Did Dr. O'Connor say if he did not start the investigation, a special investigator would?
A: Yes.

V:57 (r. 20): Second year resident:

Q: Did Dr. Brannick announce

that Dr. O'Connor officially terminated Dr. Ortega on the first of September?

A: It think it was on Tuesday when we were having our regular conferences that Dr. Brannick told us as acting Chief of Professional Education that Dr. O'Connor has terminated Dr. Ortega.

Q: Did Dr. O'Connor mention that he had offered Dr. Ortega the option of resigning?

A: Yes.

Q: And now that he was dismissed, he was not eligible for time and benefits?

Q: If I remember right, one of the residents asked if you still have those benefits and Dr. O'Connor said since you refused to resign then you, and you were terminated, then you don't, you are not entitled to the benefits.

Q: Did he say that he consulted with other officials before deciding to dismiss me?

A: Yes.

V:77 (a. 28): Alumnus at the hearing:

Q: Your experience with me over the years that we have known each other, can you say something about that?

A: I think you're autocratic. It's the first word that came to mind. Your're also an excellent teacher, one of the most creative

that I've met.

Q: In that -- I'm sorry, Mr. Hearing Officer. In your -- can you elaborate further on the autocracy?

A: In all the time that I've known you, you have made decisions about who should go where and do what and when. Seemingly regardless of what they wanted. Many residents have resented that. I've talked with many of them. I myself have resented that at times and in all that I never felt, and even in retrospect never felt that any of those decisions were made for other than concerns about their education and turning out quality psychiatrists.

V:82 (r. 5) Senior psychiatric resident:

Q: ...Simply: Why would you give $80 that you did not have at the time and that you did not have until July, for a computer?

A: Well, it's for educational and research purposes, and I was -- and I am next on the line to do research, so I am interested in it.

Q: You expect to use it in your research?

A: Yes, I used it recently. I have a -- most of the data because I'm doing research on immunology and making some correlations with psychosis.

Q: You expect to finish that research?

A: With the help of Dr. Callaway of UC (San Francisco), yes, I hope so.

Q: You expect to use the computer for that?
A: I expect to use it more often.

Q: When was the last time you used it?
A: Just recently. In your house. I don't -- maybe a month ago.

[The following week, residents received a memo that they cannot use computer!]

Q: Do you want your $80 back?
A: No, I voluntarily contributed it for the computer.

Q: Incidentally, is it costing you more to attend these hearings?
A: Yes, it would.

Q: How much have you spent of your own money to attend these hearings?
A: Oh, I've taken vacation time.

Q: How many days?
A: Since the start of the hearing.

Q: In cash, how much would that be?
A: I'm not sure. Would it be -- if it is $10 or $11 per hour, so

I took vacation. I don't know how many days already.

Q: And you did not have that money in July to give?
A: No.

Q: Why do you -- why do you come?
A: Well--

Q: This is not a movie.
A: I -- I feel I have a lot of strong feelings about this. I don't understand why you were dismissed and why so precipituously. I still don't understand.

Q: You've been to all these hearings?
A: Yes.

Q: And you cannot understand from what has happened so far?
A: I don't know.

V:91 (r. 31): Is this a fair hearing?

Dr. Ortega: Mr. Hearing Officer, when Dr. Gandhi was called, I objected because she was my witness. And so I want to call her now.

Hearing Officer: Well, I think this is as good a time as any to settle that issue. You were advised at the time that it was well established procedure of the State Personnel Board to call a witness only once. No matter which party called the witness. And at that

time the witness would testify to all relevant facts. Therefore I am not going to continue this hearing by calling all of these witnesses or any of them for the second time. So your motion to recall these people is denied.

Dr. Ortega: We have a precedent in this hearing about recalling people, so that's not true in the first day of the hearing. It's different now that I am presenting my defense.

Hearing Officer: No, you were put on notice fully and completely, Dr. Ortega, that these people would not be recalled. You choose to ignore that warning as you have many others. And therefore those people will not be recalled now. If you have other witnesses that have not testified in this matter, you may call them.

Dr. Ortega: Mr. Hearing Officer, one of the(ir) witnesses was recalled on that first day.

Hearing Officer: I don't care to argue it, Dr. Ortega. Do you have further witnesses you want to call or do you want the matter submitted.

Dr. Ortega: No, I don't want the matter submitted.

V:95/21 - 96/15 (a. 26): Is this fair?

(T)he Appellant in this matter, appearing in his own behalf, having

been previously duly sworn, assumed the stand and proceeded to further testify as follows:

Hearing Officer: You're reminded that you have been sworn before and that you're under oath, Dr. Ortega.

Mr. Rubin: Well, Mr. Hearing Officer, Dr. Ortega has already testified. (Fact: only cross-examined under protest.)

Hearing Officer: Well, he testified pursuant to my direction. He's entitled --

Dr. Ortega: I cannot be cross-examined any more because I have been cross-examined the --

Hearing Officer: Now, wait a minute, Dr. Ortega. You can be cross examined, and you're permitted to testify on your own behalf at this time. Now, this is not an appropriate time for argument. This is the time for facts.

Dr. Ortega: Right.

Hearing Officer: Arguments, I'm going to ask the parties if you wish to present any argument, to prepare the argument in writing and submit it to me. I will allow 15 days after the case is submitted for written argument.

So this is not a time for argument. This is a time for any facts that you wish to testify about.

V:110 - 111 (r. 31): Hearing denied:

> Mr. Waller found respondent's testifying in open court "a(n) intolerable burden, no question and answer format, which is the normal procedure for taking testimony for a hearing reporter, I'm going to give you an opportunity to put your testimony in writing, and then I'm going to take a look at it and Mr. Rubin can take a look at it, and then we'll reconvene for the purpose of cross-examination, if any." (What is the message, "if any"?)

V:110-111 (r. 32-33): No more hearing:

> Hearing Officer: . . . When I receive the testimony in writing, then I'll set an additional hearing date at which time we limit the hearing to Cross Examination, if any, and rebuttal testimony, if any.
>
> Dr. Ortega: And (re)rebuttal?
>
> Hearing Officer: Yes, but (re)-rebuttal is limited to what's presented on rebuttal. We're not re-opening this case.
>
> Witness: I understand that. I understand that.
>
> Mr. Rubin: Mr. Hearing Officer, Dr. Ortega --
>
> Hearing Officer: Perhaps we can handle this off the record.
>
> Mr. Rubin: Yes, sir.

Folio VI
(Hearing on Feb. 2, 1982)

VI:4-5 (r. 34): Collusion consummated:

"Well, I think what I'll do in order to be fair to both parties, or at least attempt to be fair with both parties is, we'll consider the testimony concluded; however, I'll hold the record open for another fifteen days and at that time you can submit all of the exhibits or any additional testimony that you want to present, Dr. Ortega. And I'll request that you give a copy of it to Mr. Rubin. At the end of fifteen days, I'm going to consider the record closed. At that time I'm going to prepare a proposed decision for the California State Personnel Board. The decision will be in writing; the decision will contain findings of fact; the decision will be mailed to all the parties; and it will be the decision of not just the Hearing Officer but it will be the decision of the California State Personnel Board. And under those circumstances, I'll consider the case submitted."

Folio VII

(a) ordered submitted on Dec. 29, 1981 for distribution before Feb. 16, 1982;

(b) incomplete testimony distributed on Feb. 2, 1981 with three pages missing;

(c) further submissions ordered without any further hearing or public sharing

VII:(14)047 (r. 15, 18): Another resident had complained of training as a volunteer (education should not depend on regular budget movements):

> ". . . Before I left on administrative leave, (Dr. O'Connor) told me that the investigation concerned coercion of contributors (to get training computer), and that the flap over the leave of absence (on which I had placed Dr. Vaughn until he resumed scheduled training rotation) was history.

[S.P.B. Rule 368 disallows docking in excess of 11 days in any 22-day span, and delay of rotation anticipated exceeds both. He reported to Highlind on Aug. 1, 1981.]

> "He also told me not to accept anymore residents without pay, which is against the official intent to encourage volunteerism at all levels of government. (In fact, Volunteer

Services had the only other computer in the hospital.)

". . . Even the investigator (Dr. Laskay), who was careful not to ask the (Apple) distributor about sub-purchase orders, is still ignorant about the basic facts of how computers work, namely that a printer (which Napa thought the Applewriter in the sub-purchase order was) without a computer is a seeing-eye dog without a master.

"His bias is so abysmal (or deep) he even asked the residents if I gave the newspaper the item about sexual harassment that has destroyed my reputation after the hearing (officer has) dropped one charge and left the others very much in doubt (after one day of hearing). He (Dr. Laskay) is not a very nice man."

VII:(21)137 (r. 18, 48): GOVERNMENT CODE: NEGLECTED OR VIOLATED

19302a. Appointing powers shall prepare performance reports and keep them on file as prescribed by board rule after discussing it. (Subpoena duces tecum for Napa personnel folders also denied.)

". . . THE INVESTIGATION WAS CARRIED OUT BY THE VERY PEOPLE ABOUT WHOM I HAD GRIEVIOUS COMPLAINTS."

VII:(25)173 (r. 36, 43, 48): Irony of sexual harassment charges:

". . . (The computer) facilitated the pulling together of material . . . that can be correlated during a two-week intensive orientation period.

"The correlations discovered that all men undergo a sex change operation before the recommended period for legal abortion is over. And so all . . . who are exiled from the womb before the first trimester are female . . .

". . . (R)esident who resented the implication of the endocrinological events inside the womb and the obstetrical intervention for safe abortions . . . came here on the recommendation of another alumni who was the first to come out of the closet. He had asked me if I liked homosexuals. And I said I liked lesbians best. (Because, as reproductive mammals, they were not flat-chested. One unappreciated sexual harassment complainant was. But only in public trials can that datum be processed without entering the record.)

"And so we have

"1) greed for money in an ex-felon plus

"2) resentment at being treated less than the best in an investigator (Dr. Laskay), whose sexual orientation is not a matter of choice but (as likely) a revolt (endocrine) against a sex change operation as a fetus and

"3) a computer whose purchase must not by-pass the bureaucrats who are threatened by redundancy because they cannot compete with computers (and)

"4) racism that makes what the hearing officer calls "limited" sexual harassment of Caucasian women, no matter how plain, by an Orientl a credible charge against a professional with unsullied reputation.

"If I had not just happened to make use of the computer's capacity for correlation at the wrong time, the resident who complained of being overwhelmed during July's orientation would not be the angriest but the least confused. . .

VII:225 (r. 58): Personal harrasment by homosexual alumnus:

"EVEN HOMOSEXUAL SECURITY AGENTS ARE NOT SUBJECTED TO SUCH HARASSMENT AS MY SUPPORTERS AND I HAVE BEEN, FOR BOTH SEXIST AND RACIST REASONS.

[SPB Rule 303 should have excluded all evidence of untimely sexual harassment, since it protects whomever is unfairly surprised for not having reasonable ground to anticipate whatever was thereafter offered.]

VII:(44)383-401 (a. 19): APPELLANT'S BURDEN OF DISPROOF:

A. "An excellent chief of professional education would:

"1) find it intolerable not to have a computer available for . . . residents who must cope with patients everyone has failed to help before they meet.

"4) not make patients compete for time with the computer against paper-hungry bureaucrats.

"8) not wait for approval in getting ready for the future under time pressures.

"13) support residents while uncertain if also weak, instead of demanding uniform compliance to a calendar of expectations.

". . . Any Chief of Professional Education WHO CANNOT MEET ABOVE STANDARDS SHOULD SIT BEHIND A DESK AND WAIT FOR PENNY-PINCHERS TO PASS THE BUCK.

VII:(44)387-9 (a. 19, 37): Who is truly more incompetent?

B. Levels of and responsibilities for incompetence:

"4) For an official (Dr. O'Connor) to (a) approve of exclusive use of data processing equipment for training and research and (b) agree

to buy accessories and then say (c) he's sorry, he did not know it has to be donated to be augmented, and (d) it needed to be cleared when applicable EDP policies exempt such purchases also (four-squarely) borders on incompetence. . .

6) And for a business manager (Mr. Friday) to boast of getting a computer but not know the first thing about it, confusing hardware with software, and a $2,000 item of equipment witha $75 worth of programmed diskette is more than incompetence, it is IGNORABISSIMUS.

7) And not to be able to read a shipping invoice to discover that the software was marked undelivered is incompetence even in a shipping clerk. BUT NOT TO BE ABLE TO DISTINGUISH BETWEEN A STOCK NUMBER AND A REGISTRATION NUMBER WILL NOT GET ONE EMPLOYED EVEN AS A STORE CLERK.

C. Inefficiency (small work output, excessive delays) assumes competency but should not:

"1) To take 12 weeks for 3 investigators hand-picked by the business manager to come up empty except with hearsay evidence . . . is inefficiency unmatched by armchair amateurs like me (who must investigate, charge, and defend). All I did was enter their statements into the computer and share it with those they investigated and ask for

their comments.

"2) And (for Mr. Friday, the business manager) not to investigate the equipment except for one glance at it while he was passing by in the hall, but to miss it the week after he finally persuaded his boss (forgetful Dr. O'Connor) that I had deceived him is self-deception or wish-fulfillment that is unworthy of a professional. (Or is that restraint of curiosity I insisted on when I interrupted his regular flirting with my secretaries? . . .

"3) For the executive director (Dr. O'Connor) not to know about feasibility studies when he is the only one who may order it in the case of exempt equipment (all under $75,000.00) is not efficient administration. It is dependent management which leaves one at the mercy of those who might not be dependable even if they are (more) knowledgeable. . . All it takes is . . . a few thoughtful questions whenevery you suspect that projection takes the place of performance. You should at least know what you don't know and ask, instead of assuming those who know will act. . . But in a bureaucracy, information is an instrument of barter. So one needs to be even more hard-nosed in inquiring.

"4) (For Dr. O'Connor) (t)o think of computers as no more necessary than "a sink or a screen", and not

entitled to more careful consideration is not to know how much time and temper can be saved by computers. . .

D. "INSUBORDINATION (mutinous, disrespectful coduct):

"I deal with sister hospitals directly, and with other hospitals here or out of state or out of the country, and nobody except our sister hospitals knows who our executive director (Dr. O'Connor) is. . .

"The only (other) time I wrote a letter for his signature was in reply to an inquiry by (acting) chief deputy director (Dr. Barter) of the department, pretending interest in our meeting new accreditation (training) requirements.

"I wrote a paragraph saying it was my policy to exceed all accreditation requirments, and we will succeed without a hitch if we get more computer power and replacements for old video equipment. He signed that (letter) because the inquiry was directed at him. (It probably opened the door to talking about electronic educational capabilities.) Could he have forgotten the implicit promise in that letter for more computer power? THE CHANCES ARE THAT HE CANNOT HONESTLY RECOLLECT WHAT HE SPECIFICALLY SIGNED!

"ONLY TWICE DID HE ASK ME TO DO SOMETHING, AND BOTH TIMES IT CONCERNED THE SAME PERSON (Dr. Laskay).

"a) The first time he asked it as a (personal) favor, to pay Dr. Laskay (a training stipend) from the start; and then he relented later, after hearing some unflattering things about Dr. Laskay. I reassured him Dr. Laskay's patients are well taken care of. (And so are Dr. Vaughn's, or neither would have continued as my supervisees.) . . .

"b) The second time was when he wanted me to go an administrative leave: He said I should not start residents without pay. He said HE SAID HE WAS AFRAID THE ATTORNEY GENERAL WOULD FIND IT ILLEGAL. He did not know there is a specific provision in the Governmert Code encouraging all agencies to accept volunteers.

"E. DISHONESTY (corruption, lying, cheating, stealing):

"1) IF the B.M. (Mr. Friday) knew that the printer costs more than the entire total of the sub-purchase orders, it is DISHONEST of him to mislead the C.E.O. (Dr. O'Connor) into believing that the subpurchase orders included a printer.

"2) And it is DISHONEST of respondents to present FALSE instruments as exhibits, not only

one but thrice: (a) an unsigned thank-you note to the donor of the printer, (b) and unsigned contract for the computer consultant, and (c) the first (computer consultant) contract, purported to be disapproved when it was not forwarded at all.

"ALL WERE FILE COPIES AND TWO (a and b) HAD SIGNATURES BY THOSE WHO NEED TO SIGN THEM.

"3) It is compounding DISHONESTY with DECEPTION (of the deputy attorney general) when it is alleged (on the basis of disinformation) that the hospital is more than just an agent when a contract has been approved by duly constituted authorities.

"NOT ONCE IN MY 17 YEARS HAS THE HOSPITAL DELAYED PROCESSING MY CONTRACTS NOR DELAYED COUNTER-SIGNING (RUBBER-STAMPED RECEIPT OF) APPROVAL BY DULY CONSTITUTED AUTHORITIES. . .

8) It is CORRUPT to confiscate my papers and select from them what weapons to use against me (to defend themselves). (a) And CORRUPT to threaten me with what friends entrusted to me personally, and use them to get at me without their permission. (b) And (CORRUPT) to try to suborn testimony by blackmail and proceed to blacken the personal reputation of a professional testifying to impersonal and professional

matters. (c) And (CORRUPT) to imply she is perjuring herself (to be consistent) with a ten-year-old Valentine Card.

"13) And it is LYING to claim that the computer consultant contract was held up because there had been no inventoried data processing equipment.

"14) And it is LYING to say that no purchases can be made without feasibility studies (of which one is ignorant) when the amount involved is under the maximum that is exempt (and there was a feasibility study on file).

"15) And it is LYING to allege that the consultant will have been overpaid because he is no expert when (after) he has been adjudged one and his contract has been approved by better experts than local pretenders.

"16) It is DISHONEST (of Dr. O'Connor) to send me on administrative leave secure in the belief that the investigation will not discover coercion of contributors because there had been none, and then announce that one had suspected deception even before the complaint of coercion came up.

"17) And it is (a) LYING to the residents to reassure them that nothing will change . . ., and when the (two-week) investigation came up

empty, (b) MISREPRESENTATION to say he (Dr. O'Connor) extended my leave to rest all rumors about me . . .

"18) And it is NOT HONEST (of Dr. O'Connor) not to offer that (a) we wanted what we bought for ourselves and (b) he promised support for training accessories to maintain accreditation and serve our patients better (which Dr. O'Connor never retracted).

"O) DISOBEDIENCE (violation of command or prohibition

"1) The B.M. (Mr. Friday) disobeys legislative intent when on two separate occasions he refused to transmit (to headquarters and to Dr. Ortega) the consultant contracts. . .

"3) (H)is team . . . disobeyed the C.E.O. if Dr. O'Connor honestly wanted to know the facts.

"P) EXPROPRIATION: misuse of another's property:

"2) It is misuse of state care (for Mr. Rubin, deputy attorney general) to recall an investigator back to the hospital from his home to claim four hours of overtime to deliver illegally a stamped envelope containing a blackmail threat.

"3) It is expropriation to demand the residents not use their own computer (even after they have

already been interviewed by the investigators).

"T. OTHER MISCONDUCT indisputably discrediting agency:

"1) It reflects on the hospital for its officials (a) to present . . . false instruments . . . as exhibits, (b) disrespectful of the hearing officer, (c) contemptuous of the State Personnel Board, (d) also illegal even if one is not under oath, and (e) probably worse that perjury which is easier to remedy.

"2) Further to sensationalize . . . by publicity releases when it is not the usual hospital practice also reflects on the hospital, and not to its credit.

"3) It is not creditable (literally and figuratively) for a hospital to demand residents give up personal holiday and vacation time to attend hearings that may decide their future.

"4) It is abuse of power under color of office to discourage right of peaceful assembly.

"5) It is abuse of power under color of office to deny owners the use of their property.

"6) It is abuse of power under color of office to withhold salary of faculty protesting against the bias of a witch hunter (Dr. Laskay),

alter his teaching schedule, and then offer duties not in his contract to make him depart from a program he helped build at the risk of disaccreditation by default.

"None of the above, (unlike the causes for dismissal under the same headings,) are make-weight, since they all form a pattern of performance. . . . Only because the pattern is undeniable does the motivation emerge as irresistible.

"If it takes 5 different individuals 67 specific separate or joint acts or omissions to allege and try 9 alleged against me, it is truly a mismatch, and it is the state and not my accusers I must confront.

"And it took only half as long as it took three investigators three months for me to discover and even to document them. If that makes me six times more efficient as an amateur, I am not surprised. But I am not being tried as an amateur investigator, but as Chief of Professional Education. (In that I have no peer in state service.)

VII:(44)440 (r. 56, a. 19): Evolution of baseless charges:

"We stopped to pick up my mail on our way back from vacation, and found my office locked up but not the computer.

"I thought they did change locks of

the offices because of theft. It soon turned out I was the one they didn't want inside my own office.

"I am allege(d) not to have followed proper donation procedures to obtain an inventory number for delivered equipment. I doubt that anyone even now knows for sure which procedures apply to equipment not intended for general hospital use but must be traceable in case of loss. . ."

(44)443 (r. 56): Was there reasonable cause to suspect?

[1) I dictated the thank-you notes.

[2) Their wording precludes hospital use of computer equipment.

[3) Dr. O'Connor tried to defend sub-purchase orders of accesories by repeating my justification that they are modular (interchangeable).

[4) He had thanked the contributors for obtaining a training computer.

[5) Without hospital inventory numbers, Mr. Friday can defer transmission of contracts.

[6) Having them finally processed and approved, better allege trespass when the computer is picked up over the week-end.

[7) Date administrative leave so

that it does not seem trespass.

[8) Repeat belief in hospital's ownership.

[9) But thank-you notes belie the belief.

[10) Allege forgery for donor whose signed letter may turn up missing.

[11) Better stick to the truth, that I dictated the letters.

[12) And the sub-purchase orders at the same time (to make the April 15 deadline).

[13) Deny the deadline.

[14) Claim short vacation was foreshortened by alleging deadline to sign.

[15) Not waiting is willful disobedience.

[16) The subpurchase order was copied from another list of equipment and shares one identical error.

[17) The list says some had already been delivered.

[18) Why have two disk drives and two monitors (deny overcrowding)?

[19) A computer can only use one printer at a time, why get an

Applewriter.

[20) Mr. Friday says it's a printer, and its his ignorance against the facts.

[21) Let's make his L.O.A memo less air-tight with notes of our own.

[22) Repeat what we noted in Notice of Separation.

[23) Find others who will complain about him.

[24) Another allegation was also outside statute of limitations, so let's add it and then amend later.

[24) Let's get two warm bodies before it is too late to amend.]

523 (37): SPB sustained dismissal now still being appealed:

"Will the State Personnel Board stand by and watch the rape of a career and the murder of a professional? OR sanctify it with a ritual sacrifice in the altar of a secular god whose name is State but begins with B for Big Bureau.

"OR refuse to bless an unholy marriage (between Napa and Davis)? AND choose to commend one grandfather for his progeny (including Dr. O'Connor)? . . .

NATURE OF CONTINUING CONTROVERSY

PRELIMINARY OBSERVATIONS/COMPARISONS

As in Reply ('R') to Petition for Writ of Certiorari ('C'), this integral but separable part of respondent's brief (RB) is appended (App.) to document refutation of (i) new allegations, both specified and non-specific, in current petitioners' brief (PB) and the amicus curiae brief for the U.S. (US), as well as (ii) less recent charges "noticed" in federal court by hearing counsel for NAPA before the State Personnel Board, and (iii) its own proposed findings as appended (without Notice of Punitive Action which it purportedly sustains) in the petition for writ of certiorari.

PAST, RECENT AND PRESENT CONTROVERSY

What is purported to be an investigative inventory allowed petitioners to treat respondent as a criminal, from whom their employees must be protected.

NATURE OF CONTINUING CONTROVERSY

The investigators were biased, peon dismissed before there were written charges, his protest and request for referral to Agency Secretary accepted as a formal appeal against dismissal, the hearing scheduled before formal appeal against written charges was received, key witnesses examined before discovery was complete, cross-examination and subpoenas denied after court ordered full discovery, peon cross-examined before he could present his witnesses, the decision to dismiss sustained before the proceedings had been reported, and the hearings transcribed out of chronological order, filled with prejudicial errors (e.g., pronoun changes) so that only careful reading, which discourages the casually interested, discovers the context and original content of the printed record.

NATURE OF CONTINUING CONTROVERSY

If NAPA had been a prison instead of a hospital, respondent's "house arrest" throughout his illegal administrative leave would be equivalent to an indeterminate isolation during the time he is held in administrative segregation as a suspect following an alleged offense, pending indictment. Like Hinckley's, but for different reasons, his papers will be impounded (commandeered without war or hot pursuit). His segregation for an indeterminate period of time, when his illegal administrative leave was extended indefinitely, and the manner in which the state conducted its investigation indicates that petitioners had committed itself to prosecute.

If petitioners elected to employ an adversary system -- instead of the established channels for resolving grievances provided by State Civil

Service (Ex. xiv) -- then all issues must be contested before a court of law. Justice would be defeated if judgments were to be founded on a partial or speculative presentation of facts.

> The need to develop all relevant facts in an adversary system is both fundamental and comprehensive. . . . The very integrity of the judicial system and public confidence in the system depend on a full disclosure of all the facts, within the framework of the rules of evidence. U.S. v. Nixon (1974) 418 U.S. 683, 709.

Some of the material discoverable during the S.P.B. hearings were withheld despite Stat Superior Court order (Ex. H) specifying that they be furnished. "Preliminary investigative notes" were then secretly submitted to federal district court, after it had already issued its summary judgment! They were claimed to be privileged. If State wants to be ultra-technical:

NATURE OF CONTINUING CONTROVERSY

In Shively v. Stewart (1966) 65 Cal 2d 475, 55 CR 217, the Supreme Court held that discovery rules applicable to criminal proceedings should be applicable to administrative proceedings.

Under the circumstances of this case, segregation of respondent was accusatory; it was a "public act" which was functionally equivalent to an arrest, though freed "on bail" for $11,128.95, a "public act" that seriously interfered with respondent's freedom to communicate and associate, disrupted his right to work, drained his financial resources, subjected him to public obloquy, and created anxiety in him and his friends, and triggered cardiac dysrhythmia in his wife (Exhibit LL).

SUPPLEMENTARY STATEMENT FOR THE BRIEF

There had been three major shifts of attorneys for petitioners. The first, Mr. Rubin, added the charge of coercion

to the original and amended notices of punitive action. He is now counsel for the State Personnel Board defending its decision in Superior Court, delaying resolution with continued requests for continuances and slow compliance with court order to produce the full administrative record. Hearing officer copied the charge from his brief and included it among his "findings" even if chief petitioner (Dr. O'Connor, II:103/21) and his appointed investigator (Dr. Laskay, III:9/12) both denied it under oath.

After (sic) summary judgment had been handed down, state counsel for petitioners secretly submitted excerpts for (1) the federal court judge to read of the investigative notes of the late Dr. Laskay, which the Chief Hearing Officer of State Personnel Board presiding over

the administrative proceedings persuaded him to withhold, in defiance of court-order (Exhibit H) to furnish them.

She also requested (2) petitioners' ex-counsel to make a declaration of the findings and proposed decision of the hearing officer and the resolution of the State Personnel Board to sustain respondent's dismissal, and (3) the federal court to take notice of its proceedings.

A. NEW CHARGE IN BRIEF FOR PETITIONERS

Without having taken notice of the proceedings before the full administrative record was finally submitted to State Court, the second attorney of record for a third shift of attorneys in this action added a new charge in petitioners' brief (PB 24, footnote 22) that respondent "improperly placed a resident physician under his supervision

on administrative leave". His complaint was only the pretext for banishing respondent, but can be taken up first.

Because this is a new charge, the relevant California Government Code Section (19574.5) was appended to PB, after rejecting its inclusion in the Joint Appendix, because the same was charged against petitioner from the beginning. Again, like the "female medical resident" of their petition, the name is withheld. The reference is to Dr. Richard Vaughn.

> Briefly, Dr. Vaughn complained because his month's leave of absence was extended by petitioners, unbeknownst to respondent, to six months, when he only wanted to delay resuming his rotation for a month. The interruption was due to "illness" and he had used up all his

sick leave. Petitioners wanted to place Dr. Vaughn on administrative leave for insubordination in delaying his return to his interrupted rotation but, though he had recovered from cardiac arrhythmia, he was still unsure of his ability to get back to the schedule that attacked his heart. He resumed that rotation at the time he and respondent had agreed he must return at the latest.

What Dr. Ortega ordered is routine LOA:

1) LOA under SPB rule 361a routinely protects residents from automatic dismissal after five days of unexcused absence from scheduled training rotation (see below; also Exhibit 21 in Appendix, and excerpts III:104, I:50, 52, 55, and IV:40);

2) no one can be docked more than 11 days

in 22 days under SPB Rule 368 and "(t)he appointing power SHALL not grant paid absences to break the continuity of a leave of absence without pay".

Rule 364. A leave of absence is terminated by a) expiration of the term thereof, b) sooner revocation by the appointing power with the approval of the executive officer, OR by the executive officer with the approval of appointing power, AND by receipt of the employee of written notice of such revocation AT LEAST 15 days prior to the effective date of the revocation; OR the sooner cancellation thereof by the employee WITH the approval of the appointing power. None happened here.

III:104: Counter-cross-examination:

Mr. Rubin: Dr. Ortega, is this the memorandum you sent Dorothy Owen?

A: Yes.

Q: Now, on that memorandum it indicates that Dr. Vaughn was going to be on leave, doesn't it?
A: Right.

Q: Does it say why he's going to be on leave.
A: No.

Q: But I believed you testified that in your memorandum you told the administration why you were placing Dr. Vaughn on leave.
A: No.

Q: Did you ever tell anybody in the Personnel Office why you were placing Dr. Vaughn on leave?
A: Because he wasn't going to Highland.

Q: Did you tell anyone that?
A: It's in there.

Q: The document indicates that Dr. Vaughn requests a delay of his next rotation and will be on leave of absence. Does it indicate that you were placing him on leave?
A: Yes.

Q: Where does it so indicate?
A: "He will be on leave of absence from July 1, 1981 until he reports to Highland. We will let you known when he reports there."

I:69 (a. 19): LOA not a surprise:

Dr. Ortega: . . . (Y)ou wanted to wait until August?

Dr. Vaughn: Right.

Q: And I placed you on one month's leave of absence?
A: Apparently you did.
Q: Did you know that if you had not reported to Highland for five consecutive days, you would have been automatically dismissed?

. . . .

Hearing Officer: Oh, that's pure speculation. I am well aware of a provision of law which is FREQUENTLY used for absence WITHOUT leave termed AUTOMATIC RESIGNATION (emphasis added). He may or may not have been aware, but let's get on to relevant issues concerning why he was denied 30 days.

[Above is the "independent hearing officer" counsel extols in footnote 22, PB 24, and in utter ignorance of the essential differences between Leaves of Absence and Administrative Leaves, thus adding another new charge besides "coercion" to the Notice of Punitive Action. Calling the hearing officer "independent" suffices for counsel to call judicial notice, once more, to the

findings of the State Personnel Board proceedings.]

Dr. Ortega: You wanted an elective in the same area?

A: Yes.
Q: After not completing it before?

S.P.B. Rules 361 and 368 differentiate LOA from administrative leave in the State Civil Service. Moreover, respondent was not acting in secrecy, nor inflicting damage by invading privacy or confiscating property rights to a career. Yet not only was there "finding" of (VII) secrecy, but also of (VI) "coercion" (see below), which was not even charged in the Notice of Punitive Action.

[What was somewhat hesitantly diagnosed above as "utter ignorance" (inadvertent error) on the part of counsel about what was ALLEGEDLY

improper in having a resident on leave of absence (LOA) is that he was NOT placed on administrative leave (AL). The tentative diagnosis may well change to "malicious misrepresentation" -- akin to earlier representation of the work-relatedness of seized souvenirs, now omitted from brief for petitioners -- because (1) such ignorance is not shared by petitioners and (2) "error" is deliberately compounded by the submission of the very same statutes objected to when first designated by respondent for joint inclusion in an appendix that saves time for the Court and space for argument:

[I:79/9: Personnel Officer offered AL:

> [Dorothy Owen: (Dr. Ortega) said he had not ordered Dr. Vaughn to work with Dr. M., that he had done this without his permission. I said you were aware that he was working there and you didn't tell me. And I said what you should have

done if you were to do punitive action, that he was, you know, being insubordinate, then it's not a leave of absence as requested by the employee.

[Dr. Vaughn was not insubordinate but a hard driver and slow learner. He got cardiac arrhythmia competing with younger interns in a general hospital in order to regain the medical license he lost on conviction for fraud. He received medical treatment and got better physically (as respondent himself verified in the tennis court) but had not regained enough confidence to pit himself professionally against younger doctors. He asked for a month's delay in his rotation (Exhibit 21), which was granted but was not to be subsidized, according to S.P.B. rules.

[Nor is this the first L.O.A. granted by respondent after an illness that exhausted sick leave

reserves, but never before to an ex-con still in the middle of his rehabilitation after conviction and long imprisonment for hustling (or "working energetically") for money. (He got credit but no financial reward in his first three months of training, when respondent accepted him as a "hospital volunteer" for a private hospital instead of a "medical resident" subsidized by the state).]

All older charges by others (B-D) are refuted (separately) in more detail further below, after counter-charges 1 to 3, and the latest bottom-of-the-barrel insinuation (E) from two experts without comparable experience will be dealt with last.

Does it ever undo what needs undoing merely to define precisely just what is

vexatious? Appended are documents of details of scope of violations of civil rights. Successive levels of omissions or transgressions are listed here with explanations added where necessary:

The first is at the hospital level (under SPB rules), the second at state level (under the State Civil Service Act of the State Constitution), the third at federal level (under the Bill of Rights, especially after the 1972 amendment of the California State Constitution by a privacy referendum), and the last at the earliest level of expectation under common law (as old defense of property and privacy merged with that of eroding human dignity in the evolution of civilization).

1. STATE PERSONNEL BOARD RULES BROKEN

By the time respondent was placed illegally on administrative leave, his

grievance against petitioner Friday, -- who headed the amateur team investigating suspicions of forgery of chief petitioner O'Connor's signature (below), -- was already three months old (r. 8). Access to Agency Secretary (Exx. N, xiv) was blocked (r. 21). The following S.P.B. Rules were violated, despite the spirit of the First Amendment that prompted their inclusion by the State Personnel Board under the mandate of Government Code Sec. 18714, in compliance with the State Civil Service Act of the California Constitution. Moreover, common law prohibition of investigation by those with vested interest (Mr. Friday and Dr. Laskay, r. 18) in the result was also disregarded.

SPB Rule 540. A grievance exists WHENEVER an employee believes that he/she has in any manner been adversely affected in employment by an action or failure of action by

the appointing power, a supervisor, or another employee.

540.2 PURPOSE AND OBJECTIVES . . . Every reasonable effort should be made INITIALLY by the employee concerned and the employee's immediate supervisor to resolve the grievance informally. If such efforts do not produce a solution, the objectives in following the more formal procedure are first to establish what the facts of the situation are and then to arrive at an appropriate solution under these facts rather than dealing in personalities . . . at as early a stage in the procedure as practicable, BY SOMEONE NOT INVOLVED IN THE IMMEDIATE SITUATION or direct line of supervision.

540.3 SCOPE . . . Employees SHOULD be encouraged to use the less formalized grievance procedure unless they (NOT THEIR SUPERVISORS) BELIEVE this procedure will not afford them adequate consideration of their grievance.

G.C. Sec. 18714(a) (r. 21): Nothing in this part SHALL preclude the board from providing by rule for a system of adjusting employee grievances which SHALL be administered WITHIN the departments before recourse to any remedy provided in this part (emphasis added).

G.C. 19303. Performance reports SHALL be considered in determining the advisability of dismissals.

2. PRIVACY VIOLATIONS STARTED/DEFENDED

Cf. II:100-102 (App62): Ilegal advice?

> Dr. Ortega: Did you authorize searching my personal papers.
> Dr. O'Connor: After we had consulted with the attorney in the department, we felt that we could, indeed, go into state property, which was your office, and look into the state property.

If private things cannot be secure, all measures to provide safeguards for their communication or disclosure are pointless, and the concept of privacy of human personality is an empty one.

> Bumper v. N. Carolina, 391 US 543, 1968: "Claims (of) authority to search . . . announces in effect that the('re's) no right to resist the search. The situation is instinct with coercion . . . Where there is coercion, there cannot be consent."

It was in this light that the Fifth Amendment became not just a guarantee against self-incrimination but against coercion: Justice Clark (himself once a

prosecutor) noted that when a confession is coerced, the Fifth and Fourteenth Amendment kept it out of federal and state courts, respectively. Didn't it make sense, then, to apply the same rule "to what is tantamount to coerced testimony by way of unconstitutional seizure of goods, papers, effects, documents, etc.?"

When given direct, literal application, the Fifth Amendment is not protection of privacy. Rather it is protection against coercion (in its varying degrees of brutality). It protects a fundamental concept of fairness: a person required to testify against himself would face a cruel trilemma: self-accusation if he tells the truth, perjury if he does not, and punishment for contempt if he refuses to answer. Even immunity does not dissolve Fifth

Amendment protection against coercive or deceptive intrusion into non-conspiratorial privacy.

Certain communications are privileged because their disclosure would result in an unjustified injury to privacy. The communication must originate in a confidence that disclosure will not be made. (Ex. 19, the seized book of poems, specified that it be opened in secret.) This element of confidence must be essential to maintaining a satisfactory relationship, which the community thinks ought to be protected, and injury to which would be greater than the benefit of disclosure. (Who gained what gains?)

Information gathering must not preempt the right to work. The right to examine the harvest and challenge its accuracy must be honored. And the sub-

ject must be informed of the distribution of information, especially if the distribution is designed to gather more.

White v. Davis, 1975, 13 C3d 757, 773, 120 CR 94, 104: Data-gathering activities must be "justified by a compelling state interest". (California Search and Seizure Practice, p. 10): "The right of privacy is the right to be left alone. It protects our thoughts, our emotions, our expressions, our personalities, our freedom of communion and our freedom to associate with the people we choose.

"Fundamental to our privacy is the ability to control circulation of personal information.

"The right of privacy is an important American heritage and essential to the fundamental rights guaranteed by the First, . . . Fourth, Fifth, and Ninth Amendments to the U.S. Constitution. This right should be abridged only when there is compelling public need.

"There should be no ambiguity whether our consitutional freedoms are for every man, woman and child in this state."

Sec. 1, Art. 1, California Constitution:

All people are by nature free and independent, and have certain

inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety, happiness and privacy. (1972 Amendment by referendum.)

Any intrusion -- even the shining of a flashlight into a darkened interior of a car -- may be a search (People v. Bello, 1975, 45 CA 3d 770, 119 CR 838):

VII:(80)32: ". . . (T)he investigators looked for love letters to ruin my reputation, and hate letters to indict me. . .

"There were hate letters from rejected women and one from the resident I talked about . . . It was not because he was gay, but he worshipped me and was not accepted unconditionally (like one who is mentally ill. He saw me accept them and lay conditions down when it came to him. He has recently re-applied to resume residency here.)

". . . They say (now) they searched my papers because they belong to the state. Do my family's photographs belong to the state?"

[Above testimony, which is directly relevant to this action, was directed to be written by the hearing officer (r.

32) in the proceedings asked to be noticed in federal court.]

California courts have shown no inclination to depart from the federal interpretation of the self-incrimination prohibition (People v. Sudduth, 1966, 65 C2d 543, 546, 55 CR 393, 395), including but not limited to a breath test for alcohol.

Even before the exclusionary rule, "physical or psychological coercion to obtain incriminating statements or leads to incriminating evidence" were condemned as violations of due process of law.

The Privacy Act of 1974 provides that individuals be informed of (1) the authority of the solicitor of information, (2) whether it is mandatory or voluntary to inform the authority, (3) the principal purpose for which the information

is to be used, (4) its routine use, and (5) the effects of not providing it.

Cf. II:167 (App69): Who can search?

> Dr. Ortega: The witness testified that he was looking for forged documents.
>
> Hearing Officer Waller: If I were investigating this, I would be looking for forged documents AS WELL AS EVERYTHING ELSE THAT WENT ALONG WITH IT (emphasis added).
>
> Dr. Ortega: And my question is: When did he start looking for forged documents?
>
> Hearing Officer Waller: All right. You may answer the question.
>
> Dr. Laskay: There were two occasions on which this arose. The first one is when Dr. O'Connor himself did not originally recall signing anything other than the two sub-purchase orders. He later decided that that was his signature and he must have signed it at the same time that he signed those two sub-purchase orders.
>
> The second issue-
>
> Dr. Ortega: That's the first instance? He could not recall what he did that day?
>
> A: He recalls signing the two subpurchase orders. He does not specifically recall signing the thank-you letters.

Cf. II:112 (App73): Who misled whom?

Dr. Ortega: The question is: In all the time you knew me as Chief of Professional Education, have you been misled by me?

Dr. O'Connor: Only you know that.

III:7: Notes withheld during hearing:

Dr. Ortega: How many people did you talk to?

Dr. Laskay: Probably thirty-some people.

Q: And how many of them were reported to Dr. O'Connor?

A: The conversations with everybody that I had were reported to Dr. O'Connor.

Q: Thirty conversations?

A: That's correct.

Q: And they were written up?

A: We discussed this from my handwritten notes that I made either at the time of the interview or immediately after.

Q: Positive as well as negative statements?

A: Yes.

Q: And those are available if we subpoena those records?

Hearing Officer: Well, that's not an appropriate question.

Dr. Ortega: Okay.

Q: They are available?
A: I still have my records available.

G.C. 19851 (r. 28): Right to subpoenas:

> The board or its authorized representative SHALL issue subpenas for witnesses for the employee upon his written request and at his cost. The board or its authorized representative MAY request such costs to be prepaid. (None incurred.)

State Superior Court Order on November 2, 1981 granted discovery of all "investigative notes" (Ex. H), but when demanded of Dr. Laskay on November 16, 1981, hearing officer ruled (II:150, App69) that the court overstepped its bounds.

Hearing Officer also refused to issue any subpoenas for anything (records) or anyone (near or far), because of his tender feelings for confidants (II:151):.

> Dr. Ortega: Mr. Hearing Officer, the Government Code that makes this privileged information is what?
> Mr. Rubin: Well, Mr. Hearing Officer, I'm not going to do Dr. Ortega's research for him. He's free to look that up.

NATURE OF CONTINUING CONTROVERSY

[There was no such Government Code.]

G.C. Sec. 11507.6. After initiation of a proceeding . . . a respondent . . . is entitled to (f) investigative reports made by or on behalf of the agency pertaining to the subject matter of the proceeding, to the extent that such reports contain knowledge of the acts, omissions or event which are the basis for the proceeding, or (2) reflect matters perceived by the investigators in the course of his investigation -- (as asserted for Dr. Laskay's when submitted AFTER summary judgment in federal district court, having withheld it in defiance of Superior Court Order [H] to produce it) -- in the course of his investigation . . .

Hearing Officer Waller: You may proceed.

Mr. Rubin: Thank you.

Dr. Ortega: And, also, Mr. Hearing Officer, that was part of the petition to compel discovery, and these are statements that have been written, and part of those (that) have not been surrendered.

Hearing Officer: Well, you can talk to Mr. Rubin about them. He may, in fact, give you the notes. I don't know. But this witness is not going to testify about those notes. They are not important at this stage of the proceedings.

[Hearing Officer knew their relevance.]

III:20/24: Only Dr. Reynolds came forth:

Dr. Ortega: No(w), in your investigation, did you come up with anything then?
Dr. Laskay: At that time?

Q: Yes, when you questioned me.
A: I had had the discussion already with the one female resident. (II:7)

Q: And that was the only one you had?
A: At that time, that's correct.

Q: Right. What matters did you drop after that questioning?

. . .

Hearing Officer: I'm going ahead and excuse Dr. Laskay. I think he's testified long enough.
Is that the last witness you had?

Mr. Rubin: Yes. That concludes our case.
Hearing Officer Waller: Well, then, I'm going to suggest that you call Dr. Ortega as an adverse witness, under (Evidence Code) 776, so we can actually find out what the issues are in this case. Then we can go ahead and proceed in an orderly manner without groping for facts and statistics.

Mr. Rubin: I'll be pleased to do that, Your Honor.

[Under Evidence Code 776, counsel cannot

have the court thinking for him.]

Hearing Officer Waller: You'll be excused, Dr. Laskay.

Dr. Ortega: I do not want to do that. I should be permitted to present my own defense. If I have not testified, you cannot call me as an adverse witness.

[GC 11500. Admin. Adjudication, Dept. of Developmental Services:

[11513 (b). Each party shall have these rights: If respondent does not testify in his own behalf he may be called and examined as if under cross-examination.

[This is also the California State Attorney General's Opinion (No. 116, 1948):

[The basis for the difference between civil actions and administrative hearings is the Legislature believed that it was fairer for respondents to be given an opportunity to exercise their right to testify before being subjected to cross-examination. See also O'Mara v. State Board of Pharmacy (1966) 246 Cal.App.2d 8, 54 Cal.Rptr. 862.]

Hearing Officer: We're going to have you called as a witness, and we're going to identify what are the

real issues in this case. We have broad boundaries in the discretion in an administrative hearing.

Dr. Ortega: I don't think you have that discretion.

Hearing Officer Waller: I don't care to argue. You'll be called as a witness and sworn.

Dr. Laskay, you'll be excused.

[Dr. Laskay was murdered during the deposition of the investigators. His rudely interrupted cross-examination cannot now be resumed by court order.]

19582 (b) (r. 35): Decision not shared:

". . .A copy of the proposed decision shall be filed by the board as a public record and furnished to each party within 10 days after the proposed decision is filed with the board. . ."

If the State wanted to improve its Civil Service with "administrative inventories", then they should also guarantee compliance with its rules for administrative adjudication thereafter:

G. C. 18500: State Civil Service: It is the purpose of this part:

(a) To facilitate the operation of Article XXIV of the Constitution.

(b) To promote and increase economy and efficiency in the state service.

G.C. 18703: How to resolve conflicts:

The board shall provide for dismissals, demotions, suspensions , and other punitive action for and in the State civil service in accordance with Article XXIV of the Constitution and this part.

G.C. 18714: How to redress grievances:

(a) Nothing in this part shall preclude the board from providing for a system of adjusting employee grievances which shall be administered within the departments before recourse to any remedy provided in this part.

Provisions disregarded for Dr. Laskay:

Art. XXIV (Civil Service Act), Section 6:

a) No temporary appointment of a person to any position shall be made unless there is an employee list from which such a position can be filled. (There was such a list and Dr. Laskay was temporarily appointed while an equally eligible non-Caucasian was on vacation.)

b) No person shall hold a given position under temporary appointment for a longer period than 9 months in any consecutive 12 months, nor shall any person serve in the State Civil Service under temporary appointment

for longer than 9 months in any consecutive 12 months. (On Nov. 7, 1950, "eligible list" became "employment list", but not so used.)

Cf III:19: Dr. Laskay stayed too long.

Q: Your appointment in an acting capacity was at the pleasure of the Medical Director, is that right?
A: That's correct.

Q: And so you served without any civil service status?
A: That's correct.

Q: And you were serving in an acting capacity without going through the eligibility list?
A: That's correct.

It seems grossly unfair that the State can pay the illegally employed to look into a permanent employee's private medical files and personal correspondence, seize his souvenirs without permission or court order, but when a court orders that ANY notes taken of the investigation of respondent's entire life over the last ten years, they are denied, only to be submitted to another

court of the land to prove petitioners did not break the law five years before. Was it denied earlier because the state is only entitled to look into peon's professional life as an educator but could not stop looking?

3. PRIVACY AND DIGNITY ARE TRAMPLED

Continued from Brief for Respondent:

III:91: Ex. 17 was accepted as evidence!

> Mr. Rubin: Now, Dr. Sutton, I want to show you a valentine (card) dated February 14, 1972. Did you compose that valentine?
> A: Yes, I did.
>
> Q: Did you send it to Dr. Ortega?
> A: Yes.
>
> Q: All right. Now at the bottom of this - - it says, "I love you, Joyce." Is that correct?
> A: Yes. As I stated, at that time I had kind of a crush on Dr. Ortega.
>
> Q: Is that correct?
> A: Yes, at that time in 1972, almost ten years ago, I did, in fact, send that valentine.
>
> Q: Now, that's the question. .

. I'd like to introduce this as our next in order.

Dr. Ortega: Objection.

Hearing Officer: Overruled. It will be marked Exhibit 18 and admitted.

. . .

Mr. Rubin: Now, I want to show you a small volume of poetry entitled, "How Do I Love Thee?" And within it is a small note that says, "Open secretly. Merry Christmas, Joyce." Is that your note?

A. Yes, it is.

Q: And did you send this to Dr. Ortega?

A: Yes, that was December of 1972. This was, again, the same period of time. That is a standard book of poetry --

Q: Just a moment. I didn't ask you if it was a standard book of poetry. I just asked you if you sent it?

A: Yes.

Mr. Rubin: That's fine.

Dr. Ortega: Can I object to the exhibit, please?

[Thusly were a 10-year-old phothograph, a self-composed valentine of the same vintage, and a classic book of poems admitted as evidence for petitioners!]

Appendix-171
NATURE OF CONTINUING CONTROVERSY

It comes as no surprise that a taste for the ease with which tc ease out whomever does not shred all his papers is catching, and demands for more papers to inventory become urgent:

1) "Administrative inventories" achieve the covert purpose of any investigation to come up with charges, any charges at all.

2) The stolen information is a rich vein to mine for lode to satisfy the covert purpose of any prosecution to prove vague charges or come up with worse.

55 months after respondent was placed on administrative leave, a counter-charge (A) that he did same to an ex-con was added (PB 24, ftnt 22).

3) "Proposed Findings" must be shared to be verified, or else "student" will go down in history as "employee", etc.

NATURE OF CONTINUING CONTROVERSY

B. SPECIFIC LIST OF ALLEGED VIOLATIONS

After forty-four days of investigation while on extended administrative leave, respondent was charged with violations only of the following sub-paragraphs followed by fact-finding and governing laws and precedents that can clarify the nature of the controversy:

b) INCOMPETENCY (at what?)

> "Incompetency", as a ground for removal of a public officer, has reference to any physical, moral or intellectual quality, lack of which incapacitates officer to perform his duties, and criticism of a public official [petitioners Friday (privately to Dr. O'Connor, r. 8) and Donoviel (publicly at a hospital clinical executive meeting, Exhibit SS] does not constitute "incompetence". Laws, 1921, c. 669, Sec. 30. Sausbier v. Wheeler, 299 N.Y.S. 466, 473, 252 App.Div. 267.

III:122 (a. 29): NSH director fr 1964:

> Dr. Ortega: Did my department change during that time?
> Dr. Spratt: Yes, it grew considerably.

Q: While the hospital was

shrinking?

A: While the hospital was shrinking, and I will say that I always admired you for that, that you were able to maintain this residency program under the opposition of the Department of Mental Health in Sacramento.

In fact, as far as I know, you were the only one that maintained an accredited residency program in a State Hospital in California.

c) INEFFICIENCY (in what?)

G.C. Sec.14780 (r. 8): Re contracts:

"Every such contract shall be transmitted with all papers, estimates, and recommendations concerning it to the department and, if approved by the department, shall be effective from the date of such approval (July 15, in this case, yet the allegation was dated Sept. 14, 1981).

"Inefficient" means not producing effect intended or desired, incapable of, or indisposed to the effective performance of duties. Conley v. Board of Ed. of City of New Britain, 123 A.2d 747,751, 141 Conn. 488.

f) DISHONESTY (with whom?)

III:122 (a. 28): Now on hospital staff:

Dr. Ortega: In all the time you have known me, have I deceived

you?

Dr. Spratt: . . . You irritated me at times, but never deceived me.

"Dishonesty": ". . . a disposition to lie, cheat or defraud; untrustworthiness; lack of integrity." State ex rel. Neal v. State Civil Service Commission, 72 NE2d 69,71, 147 Ohio St. 430.

o) WILFUL DISOBEDIENCE (of whom?)

"Willfulness" is a wrongful act done intentionionally without just cause. McNamara v. St. Louis Transit Co., 81 S.W. 880,881, 182 Mo. 676, 66 L.R.A. 486, quoting U.S. v. Taylor, 2 Summ. 586, 28 Fed. Cas. p. 31.

"Rebellious", "mutinous" and "disobedient are synonyms of "insubordinate". State ex re. Richardson v. Board of Regents of Univ. of Nevada, Nev., 269 P2d 265,276.

G.C. Sec. 19572 (e): "Insubordination" within this section implies general course of mutinous, disrespectful or contumacious conduct. Neely v. CSPB (1965) 47 CR 64, 237 CA2d 487.

p) MISUSE OF (what?) STATE PROPERTY

"Misuse" is a simpler word than "abuse", but nearly synonymous with it. It signifies merely "to use amiss" (erroneously, Oxford Universal Dictionary).

"Property" in a broad sense is any valuable right or interest considered primarily as a source or element of wealth. Eric v. Walsh, 61 A.2d 1,4, 135 Conn. 85.

Cf. III:62 (App 82): Who owns computer?

Q: Now, to your knowledge, did that computer ever acquire a hospital number as part of the hospital's inventory of equipment?
A: No, never.

t) OTHER FAILURE (like which?) OF GOOD BEHAVIOR EITHER DURING (when?) OR OUTSIDE DUTY HOURS (where?) WHICH WAS OF SUCH A NATURE (in what respect?) THAT IT CAUSED DISCREDIT TO HIS AGENCY (according to whom) AND EMPLOYMENT (how?)

III:126 (a.37): Ex-director, now staff:

Dr. Ortega: Did I ever bring discredit to this hospital?
Dr. Spratt: Not that I am aware of.

Blake v. SPB (1977) 102 CR 50, 25 CA3d 541:

"A public employee may not be disciplined for what he does in his private life so long as such conduct does not impair the public service or cause discredit to his agency.

"The nature of the misbehavior and its effect on the public service

rather than the time or place of its occurrence are the determinative factors.

"Whatever the cause, the overriding consideration is whether the conduct harms the public service.

"A public employee may not be disciplined for what he does in his private life so long as such conduct does not impair the public service or cause discredit to his agency."

Failure of good behavior so as to come within province of this section authorizing punitive action when the failure is of such a nature that it causes discredit to officer's agency or his employment must be of such a nature that it reflects on officer's job and cannot be just any behavior which agency might consider improper. Orlandi v. SPB (1968) 69 CR 177, 263 CA2d 32.

C. FEDERAL COURT VERSION OF ABOVE LIST

The Notice of Punitive Action was further "amended" after (sic) the hearings to include the charge of coercion, in the brief submitted by hospital counsel, at the request of hearing officer, before transcribed testimony by both chief petitioner and his appointed

investigator (II:103/21 and III:9/12, respectively) denying such a charge were available, despite written testimony to the contrary by respondent (a. 20).

In the declaration of A. Rubin (counsel for petitioners during respondent's appeal against dismissal and now counsel for hearing officer in ex-peon's petition for writ of mandate in State Court) in support of summary judgment, he stated:

> 7. The decision of the Hearing Officer was issued March 8, 1982 (See Request for Judicial Notice); and the Hearing Officer upheld Dr. Ortega's dismissal on grounds of:
>
> (1) SEXUAL HARASSMENT

This was a brand-new cause for punitive action (including removal from position of authority, but not dismissal). On March 20, 1981, the State Personnel Board (Ex. 000) wrote all state agencies and asked each to "distribute a copy of

Supreme Court, U.S.
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No. 85-530

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DENNIS M. O'CONNOR, *et al.*,
Petitioners,

vs.

MAGNO J. ORTEGA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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12 pp

TABLE OF CONTENTS

	PAGE
SUMMARY OF ARGUMENT	1
A. THE CONTEXT OF AN ALLEGED GOVERNMENTAL INTRUSION IS RELEVANT TO THE QUESTION OF THE LEGITIMACY OF A PRIVACY EXPECTATION	2
B. THE WARRANT REQUIREMENT IS UNSUITED FOR THIS CONTEXT	6
C. THE ACTION TAKEN WAS REASONABLE UNDER ALL THE CIRCUMSTANCES	8
CONCLUSION	9

TABLE OF AUTHORITIES

PAGE

Baxter v. *Palmigiano*, 425 U.S. 308 (1976) 5
Camara v. *Municipal Court*, 387 U.S. 523 (1967) 7
Colonnade Catering Corp. v. *United States*, 397 U.S. 72 (1970) 7
Connick v. *Myers*, 461 U.S. 138 (1983) 2, 5
Gardner v. *Broderick*, 392 U.S. 273 (1968) 2
Garrity v. *New Jersey*, 385 U.S. 493 (1967) 5
Hudson v. *Palmer*, 468 U.S. 517, 525 (1984) 1, 3
Illinois v. *Lafayette*, 462 U.S. 640 (1983) 1, 4
Marshall v. *Barlow's, Inc.*, 436 U.S. 307 (1978) 7
New Jersey v. *T.L.O.*, 469 U.S. ____, 83 L.Ed.2d 720, 740 (1985) 8
Oliver v. *United States*, 466 U.S. 170, 178 (1984) 3, 4
See v. *City of Seattle*, 387 U.S. 541 (1967) 7
South Dakota v. *Opperman*, 428 U.S. 364 (1976) 4
Szmaciarz v. *State Personnel Bd.* 79 Cal. App.3d 904 (1978) 5
United States v. *Biswell*, 406 U.S. 311 (1972) 6, 7
United States v. *McIntyre*, 582 F.2d 1221 (CA 9 1978) 4
Wyman v. *James*, 400 U.S. 309, (1971) 1, 4

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SUMMARY OF ARGUMENT

The "context" of an alleged government intrusion is relevant to the threshold issue of whether Fourth Amendment protection is implicated. (*Hudson* v. *Palmer* 468 U.S. 517, 525, (1984); *Wyman* v. *James* 400 U.S. 309, 316-318 (1971).) An analysis into "context" involves the purpose of the governmental action, the kind of authority being exercised and the practical realities of justifying the action. (E.g., *Illinois* v. *Lafayette* 462 U.S. 640, 646-647 (1983).)

A public employee's reasonable expectation of privacy in the office is qualified by the employment relationship. The court has previously recognized that First Amendment (*Con-*

nick v. *Myers* 461 U.S. 138, 147 (1983)) and Fifth Amendment (*Gardner* v. *Broderick* 392 U.S. 273, 278 (1968)) rights are qualified or limited by the public employment relationship. By parity of reasoning, petitioners submit that a public employee's fundamental Fourth Amendment rights remain intact without stretching the scope of protection to encompass work-related office inventories or administrative searches.

The suggestion that a warrant based on probable cause is necessary for such government action is based upon a failure to recognize the practical realities of the public workplace. A warrant requirement in this context would cut deeply into government efficiency. Such a requirement simply is not supported by decisions of the Court or public policy considerations.

Specifically, the action taken in his case was "reasonable under all the circumstances" even assuming the Fourth Amendment would apply in such a context. Charges of sexual harassment, and departmental mismanagement, inter alia, justified not only respondent's placement on administrative leave but also the entry of his office and its inspection and inventory. This action was reasonably related, in scope, to the proper purposes of identifying and securing state property, and securing and removing respondent's personal property.

* * * * *

A. THE CONTEXT OF AN ALLEGED GOVERNMENTAL INTRUSION IS RELEVANT TO THE QUESTION OF THE LEGITIMACY OF A PRIVACY EXPECTATION

In our Brief for Petitioners, we recognized that Fourth Amendment protection indeed extends to one's office. We submitted, however, that the entry and inventory in this case, being for work-related concerns, did not constitute a "search" within the meaning of Fourth Amendment jurisprudence. (Pets. Br. at 8-9, 12-13, 25.) Nothwithstanding petitioners' recognition of the principle that an employee, whether public or private, would in his or her office be protected by the Fourth Amendment against unreasonable searches and seizures (e.g., by police or prosecutorial authorities in a criminal context),

amicus curiae in support of the judgment (hereinafter "invited amicus") seemingly ignores both petitioners' recognition and the narrow question under scrutiny in this case.

Invited amicus erroneously contends that it is petitioners' position a public employee may never have any reasonable expectation of privacy in the office and is subject to search and seizure by anyone for any purpose without Fourth Amendment protection. (Br., at 5, 7, 12, 18, 19, 21.) Such tilting at an imaginary windmill makes for facile argument, but detracts from a considered inquiry into the question of whether the entry into respondent's government-assigned office and the administrative office inventory in the course of his employer's administrative investigation into respondent's work-related conduct implicated the Fourth Amendment.

Petitioners submit, contrary to the contention of invited amicus (Br., at 21, fn. 13) that the justifiability, legitimacy or reasonableness of a government employee's expectation of privacy in his or her office[1] must be decided within the "context" of the governmental action in question. (See *Hudson* v. *Palmer*, 468 U.S. 517, 525 (1984).)[2]

Such an inquiry into "context" must address not only which governmental agency's action is involved, but also what the purpose of the action is. For example, although the sanctity

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[1] Contrary to the assertion of invited amicus that it is undisputed respondent had a subjective expectation of privacy in his office (Br. at 8), petitioners submit there is insufficient evidence to support the point. Respondent's self-serving statements concerning the privacy of his office fly in the face of the practical realities of the work place and are further undermined by his secretary's declaration that respondent took official files into his office and kept government correspondence there. (J.A. 20-21.) Contrary to the statement of the American Federation of State, County and Municipal Employees, AFL-CIO, as Amicus Curiae in support of respondent (Br. at 6, fn. 1), respondent was not permitted to use hospital time or grounds to counsel private patients. (J.A. 44.) Finally, on this point, a public employee cannot create a private domain by posting a name on an office door or keeping the door closed. (Cf. *Oliver* v. *United States*, 466 U.S. 170, 182 (1984).) In any event, it is appropriate to resolve the privacy issue in this case on the question of whether any such subjective expectation of privacy is one that society ought to recognize as reasonable.

[2] *Hudson* is cited not to equate government offices with prison cells, but as authority for the propriety of exploring Fourth Amendment "context" at the threshold.

of the home is a most paramount interest of Fourth Amendment jurisprudence (*Oliver* v. *United States, supra,* 466 U.S. 170, 178 (1984)) the Court has recognized that within the "context" of a social worker's home visitation for the purpose of verifying welfare assistance eligibility, the Fourth Amendment does not apply. (*Wyman* v. *James,* 400 U.S. 309, 316-318 (1971); alternatively holding that such a visit is not an unreasonable search, assuming Fourth Amendment applies).

The Fourth Amendment "context" approach taken in cases such as *Hudson* and *Wyman* establishes that factors such as agency identity and purpose are relevant to an inquiry of whether an expectation of privacy is legitimate, reasonable or justifiable. A similar approach has been used by the court in the criminal inventory search cases where governmental purpose is scrutinized. An inventory search of a criminal suspect's personal possessions without a warrant or probable cause where incidental to booking and jailing procedures is justifiable on the basis of safe and efficient operation of a police station. (*Illinois* v. *Lafayette,* 462 U.S. 640, 646-647 (1983); see also *South Dakota* v. *Opperman,* 428 U.S. 364, 367-376 (1976) vehicle inventory search without warrant or probable cause justifiable on basis of police caretaking interests, absent investigatory purpose.)

That an employee's reasonable expectation of privacy in his office can be qualified by the employment relationship is underscored by the case of *United States* v. *McIntyre,* 582 F.2d 1221 (CA 9 1978), relied upon by invited amicus (Br. at 24) for the proposition that respondent had a legitimate expectation of privacy in connection with the type of government action in this case. In *McIntyre,* police supervisors "bugged" an assistant chief's office for criminal investigation purposes. The Ninth Circuit reasoned as follows:

> "In any event, the 'bugging' here cannot be termed an 'administrative' search.

"Neither can the 'bugging' be justified as an 'internal affairs investigation'. An employer may search the work area of an employee for misplaced property or, in some circumstances, to supervise work performance. [Citations.] But defendants' purpose in 'bugging' McGann was, at least in part, to confirm their suspicion that he was involved in external crime (narcotics). Therefore, the 'bugging' was not an 'internal affairs investigation', but part of a criminal investigation . . . ." (*Id.*, at 1224.)

Nor should invited amicus derive comfort from *Connick* v. *Myers*, 461 U.S. 138 (1983) or *Garrity* v. *New Jersey* 385 U.S. 493 (1967)[3] for the proposition that constitutional freedoms are absolute and cannot be qualified by the public employment relationship. (Br. at 16.) To the contrary, while *Connick* reaffirmed that First Amendment protection applies to a government employee's "speech upon issues of public concern," such protection is not implicated when the public employee speaks upon a matter of personal interest (in *Connick*, expression critical of the public employer, *Id.* at 154.) In the context of speech, *Connick* noted in crafting its scope of First Amendment protection, the Court's responsibility "does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the State." (*Connick* v. *Myers*, *supra*, at 147.) Similarly,

[3] The issue in *Garrity* was narrow and of no relevance to this case, i.e., voluntariness of statements extracted from police officers in a criminal investigation, pursuant to a forfeiture-of-office statute. The Court held the choice between self-incrimination and job forfeiture was coercive. (*Id.*, at 496-500.) *Garrity* clearly does not stand for the proposition, as invited amicus suggests, that a public employee may invoke the Fifth Amendment privilege in a work-related investigation conducted by his superiors. The Fifth Amendment does not apply in such a context. (See *Gardner* v. *Broderick*, 392 U.S. 273, 278 (1968), concluding a police officer can be terminated for refusing to answer questions related to the performance of his duties; further concluding a termination cannot be predicated upon a refusal to waive the Fifth Amendment immunity. Accord, *Baxter* v. *Palmigiano*, 425 U.S. 308, 318 (1976)—Fifth Amendment does not apply in the context of a civil disciplinary proceeding against a public employee; *Szmaciarz* v. *State Personnel Bd.* 79 Cal.App.3d 904, 916-919 (1978)—Fifth Amendment does not apply in a California public employee personnel proceeding.)

petitioners submit that a public employee's fundamental Fourth Amendment rights remain intact without stretching the scope of protection to encompass such a work-related office entry and inventory.

In sum, although respondent may have had a reasonable expectation of privacy in connection with a police search of his office in a criminal context, for the reasons set forth in the Brief for Petitioners, respondent had no reasonable, legitimate or justifiable privacy expectation to be free from an entry and inventory of his government-assigned office by his supervisors in connection with an ongoing work-related investigation. As such, neither the entry into respondent's office nor its inventory were intrusions for Fourth Amendment purposes.

B. THE WARRANT REQUIREMENT IS UNSUITED FOR THIS CONTEXT

Invited amicus initially argues that an "investigative search" conducted by a public employer for work-related concerns may be made only pursuant to a warrant based on probable cause. (Br. at 25.) Such a process, the argument goes, will balance the competing interests of government and its employee. Later, invited amicus slightly retrenches by stating "almost all" of government's employment needs "can be satisfied without conducting an investigative search," because an employee must, as the rationale is presented, produce documents upon command or be terminated. (Br. at 34.) Therefore, the only purpose of an investigative search would be to "provide access to private materials." (Br. at 35.)[4]

[4] Such a tidy approach completely ignores the prospect of an employee destroying, altering or conveniently losing documents once it is known a requested production could establish substandard performance, or work-related wrongdoing. Further, such a position discounts the prospect of an employee stonewalling a request until substandard or incomplete work can be remedied. The real need of government in this regard, as in the private sector, is to have *immediate* access to government materials to monitor performance and work habits. Indeed, "unannounced, even frequent" access is often essential to proper supervision. (Cf. *United States* v. *Biswell*, 406 U.S. 311, 316 (1972).)

At the same time, invited amicus suggests that "routine office entr[ies do] not even raise a Fourth Amendment question." (Br. at 39) and, finally, on this point, issues a caveat that investigative searches concerning national security or other "sensitive matters" be subject to less justification. (Br. at 39.)

Such an ad hoc approach would produce confusion and paralysis among government supervisors, and, rather than offering guidance, would create a choice between supervisory inaction or potential damage liability for a possible civil rights violation. Imposition of such a choice would cut deeply into efficiency in government, and run counter to interests of society.

A requirement of a warrant based on probable cause in the context of government's work-related administrative inventory, inspection, or search of its employee's office is not supported by the Court's decisions. Even in the context of those cases requiring an administrative warrant for government's health or safety inspections of private property (e.g., *Camara* v. *Municipal Court*, 387 U.S. 523 (1967); *See* v. *City of Seattle*, 387 U.S. 541 (1967)), probable cause has not been required (*Marshall* v. *Barlow's, Inc.* 436 U.S. 307, 320-321 (1978)), even though safety, health, fire and housing regulations "are enforced by criminal processes."[5] (*Camara* v. *Municipal Court*, *supra*, at 531.) Analogizing to the business inspection cases, as both sides have, clearly the reasoning of *United States* v. *Biswell*, *supra*, 406 U.S. 311 and *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72, (1970) would apply with much greater force than the *Camara-See* rational. If a warrant is unnecessary for governmental inspection of a closely regulated industry where frequent and flexible inspection is essential (*United* v. *Biswell*, *supra*), it would be anomalous to say that before government can oversee *itself* through inventories, inspections and administrative searches of its employees' offices for work-related concerns, it must obtain a warrant.

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[5] The lower court cases concerning a search of an employee's office, desk, or locker have dealt with either a criminal search by police or prosecution authorities for evidence of crime or civil litigation (a § 1983 action or injunctive relief). (Pet's. Br. at 16-20.) Case law development discounts the concern of invited amicus (Br. at 36-37) that office inventories or work-related administrative searches "may lead to criminal prosecution."

Government supervisors and employees under their supervision often share a special relationship based upon a "commonality of interests." (Cf. *New Jersey* v. *T.L.O.*, *supra*, 469 U.S. ____, 83 L.Ed.2d 720, 740 (1985); 105 S.Ct. 733 [Powell, J. concurring].) The spectre of such a supervisor serving an employee with a warrant to view government records in the employee's office, to monitor work performance or to investigate a work-related charge, is alarming. The warrant process in such a context would chill the relationship, if not render it completely adversarial in nature. Government civilian supervisors would become de facto law enforcement officers obligated to be familiar with finely spun theories of probable cause. Such a prospect must be avoided.

C. THE ACTION TAKEN WAS REASONABLE UNDER ALL THE CIRCUMSTANCES

Beyond the warrant issue, it is clear the action taken in this case was reasonable under all the circumstances. At its inception, the action was justified given the serious work-related charges leveled against respondent which included sexual harassment and mismanagement of employees. Nowhere in the brief of invited amicus is it suggested an inspection of respondent's office would not have been justified under any circumstances. Rather, invited amicus argues the scope of the "search" was overly broad and unreasonably intrusive.

Throughout the brief of invited amicus, the government action in this case has been mischaracterized as a search of personal property for evidence of wrongdoing. The reasons for the action authorized by petitioners included a need to identify and secure state property and records from respondent's office, to maintain access to State files, and to clear the office of its contents so it could be used by another employee. (Br. of Pets. at 4-5.) Under these circumstances, the scope of the inspection was necessarily broad so that any State property could be secured for continued State use and private property assembled and stored for respondent.[6]

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[6] Given the legitimate purposes which existed for the action authorized by petitioners, a warrant requirement would not have produced a different result in this case as the State would still have had a right and obligation to secure its property.

Petitioners re-emphasize that the entry, inspection, and inventory of respondent's office were reasonable in light of the context of the action as well as its purposes. There was a reasonable relationship between the scope of the "search" and the hospital's need to inventory the office and secure its own property.

CONCLUSION

For the foregoing reasons, petitioners urge reversal of the decision of the Court of Appeals. Respectfully submitted.

Respectfully submitted,

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QUESTION PRESENTED

Whether state officials violated the Fourth Amendment by entering and searching the office of a state employee in connection with an administrative investigation of that employee's job performance and work-related conduct.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	1
Summary of argument	5
Argument:	
The entry and search of respondent's office by his employer for business-related reasons did not violate the Fourth Amendment	7
A. A government employee has no reasonable expectation that a supervisor or co-employee will not enter his office in the course of performing employment-related duties	8
B. A supervisor's or co-employee's search of an employee's office is reasonable if it is undertaken for a legitimate employment-related purpose	15
Conclusion	23

TABLE OF AUTHORITIES

Cases:

Arkansas v. *Sanders*, 442 U.S. 753	21
Arnett v. *Kennedy*, 416 U.S. 134	12
Cafeteria & Restaurant Workers Union, Local 473 v. *McElroy*, 367 U.S. 886	12
Chenkin v. *Bellevue Hospital Center*, 479 F. Supp. 207	14
Connick v. *Myers*, 461 U.S. 138	6, 12, 13, 17
Curtis, Ex parte, 106 U.S. 371	12
Davis v. *Scherer*, No. 83-490 (June 28, 1984)	7
Delaware v. *Prouse*, 440 U.S. 648	18
Gillard v. *Schmidt*, 579 F.2d 825	20
Harlow v. *Fitzgerald*, 457 U.S. 800	7
Hudson v. *Palmer*, No. 82-1630 (July 3, 1984)	8
Illinois v. *Lafayette*, 462 U.S. 640	18, 21
Katz v. *United States*, 389 U.S. 347	4, 8
Kelley v. *Johnson*, 425 U.S. 238	12
Mancusi v. *DeForte*, 392 U.S. 364	5, 8, 9, 15 19
Marshall v. *Barlow's, Inc.*, 436 U.S. 307	16
New Jersey v. *T.L.O.*, No. 83-712 (Jan. 15, 1985)	6, 8, 12, 15, 17, 21
Oliver v. *United States*, 466 U.S. 170	13, 14

Cases—Continued: Page

Smith v. *Maryland*, 442 U.S. 735 8
South Dakota v. *Opperman*, 428 U.S. 364 ..... 16, 18
Terry v. *Ohio*, 392 U.S. 1 17
United States v. *Blok*, 188 F.2d 1019 19
United States v. *Bunkers*, 521 F.2d 1217, cert. denied, 423 U.S. 989 19
United States v. *Collins*, 349 F.2d 863, cert. denied, 383 U.S. 960 19
United States v. *Gargiso*, 456 F.2d 584 15
United States v. *Knotts*, 460 U.S. 276 8
United States v. *Martinez-Fuerte*, 428 U.S. 543 17
United States v. *Matlock*, 415 U.S. 164 14
United States v. *Nasser*, 476 F.2d 1111 20
United States v. *Place*, 462 U.S. 696 18
United States v. *Reeves*, 730 F.2d 1189 15
United States v. *Sanders*, 568 F.2d 1175 19
United States v. *Speights*, 557 F.2d 362 22
United States v. *Villamonte-Marquez*, 462 U.S. 579 18
Williams v. *Collins*, 728 F.2d 721 20

Constitution, statutes and rule:

U.S. Const.:
Amend. I 12
Amend. IV ..... *passim*
42 U.S.C. 1983 ..... 1, 7
California Tort Claims Act, Cal. Gov't Code (West 1980):
§ 900 3
§ 905.2 3
§ 911.2 3
§ 911.4 3
Fed. R. Crim. P. 41 17

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

This case involves a state governmental agency's authority to enter and search an office assigned to one of its employees in order to inventory government property in connection with an administrative investigation into the employee's work-related performance and conduct. The court of appeals has held that a warrantless entry into such an office violates the Fourth Amendment and provides a basis for an award of damages under 42 U.S.C. 1983. Because the Court's decision here regarding the constitutionally permissible scope of a work-related intrusion into a government employee's workplace will also apply to the federal government in its capacity as employer, the United States has a strong interest in this case.

STATEMENT

1. Respondent was Chief of Professional Education at Napa State Mental Hospital (Napa), a public institution owned and operated by the State of California, and served as a psychiatrist at that institution for 17 years, from

1964-1981. In July 1981, respondent became the subject of an administrative investigation as a result of complaints of sexual harassment filed by two female Napa employees and certain questions raised about the management practices of his department, including the questionable acquisition of a computer (see Pet. App. A10-A13).[1] On or about July 31, 1981, respondent was informed by the Executive Director of Napa, petitioner O'Connor, that he was under administrative investigation; respondent was directed in writing to stay off the Napa premises and not to return without written approval. Respondent thereupon took two weeks vacation leave; upon the expiration of that leave on August 14, he was placed on administrative leave with pay pending completion of the investigation. Pet. App. A1-A2.

On August 17, 1981, petitioner O'Connor was informed by a hospital staff member that respondent had entered the Napa premises the previous weekend without permission and had taken home the computer, which was kept in

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[1] Specifically, respondent was charged with (i) making unwelcome sexual advances to a young female student assistant working under respondent's supervision and to a female social worker at Napa (Pet. App. A11); (ii) using his position to coerce money for the purchase of a computer from residents under his supervision by promising them that they would be given overtime work to cover their contributions when such overtime work in fact was not authorized (*id.* at A11-A12); (iii) placing a resident under his supervision on unpaid leave for a month for refusing to contribute to purchase of the computer (*id.* at A12); (iv) causing the Executive Director of Napa, petitioner O'Connor, to sign two subpurchase orders for additional computer parts by misrepresenting to him that the computer had been donated to the hospital (*id.* at A13); and (v) violating state rules and policies by arranging to have an outside consultant demonstrate the computer to the hospital residents without obtaining prior approval and by agreeing to pay amounts in excess of the authorized rates for these services (*ibid.*) These allegations were all determined adversely to respondent at the administrative hearing concerning his discharge (*id.* at A10-A14).

a room adjacent to his office. Petitioner O'Connor believed that the computer was state property, although in fact it was not. Pet. App. A2, A13; see note 1, *supra*. Subsequently, in furtherance of the administrative investigation and in light of the incident with the computer, petitioner O'Connor directed four Napa employees—including petitioner Friday—to enter respondent's office on the Napa premises " 'in order to separate the business files from any personal files in order to ascertain what was in his office' " (Resp. C.A. Br. 4 (quoting J.A. 50).[2] These employees made some effort to sort the items found in the office, but ultimately all the material, other than three items retained in connection with the investigation (see Pet. C.A. Br. 6), was placed in boxes and taken to a locked storage area where it was made available for respondent to collect. Pet. App. A2.

As a result of the investigation of the allegations of misconduct identified above, respondent was eventually terminated from his position at Napa as of September 22, 1981. The termination was upheld on appeal to the California State Personnel Board. Pet. App. A9-A15.

2. Respondent brought this action against petitioners—four Napa officials—in the United States District Court for the Northern District of California under 42 U.S.C. 1983 alleging, inter alia, that their actions violated his Fourth Amendment rights.[3] Respondent sought $250,000

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[2] Respondent's practice was to lock his office when he went home for the day, and he stated that he believed he had the only key to the office. This was not the case, of course, and the hospital personnel entered the office using another key. Pet. App. A2.

[3] Respondent also made pendent state law claims for invasion of privacy and breach of covenant of good faith and fair dealing. Pet. App. A3. The district court concluded that respondent's state law causes of action were barred by his failure to comply with the California Tort Claims Act, Cal. Gov't Code §§ 900, 905.2, 911.2, 911.4 (West 1980), and the court of appeals affirmed on that issue. Pet. App. A3, A7, A8.

in compensatory damages and $500,000 in punitive damages (J.A. 6). On cross-motions for summary judgment, the district court granted summary judgment for petitioners and dismissed the action without opinion. Pet. App. A8. In a brief statement from the bench, the court concluded that the entry into the office was justified by the "need to secure the office" and therefore that the search was "reasonable" (J.A. 23).

3. The court of appeals reversed (Pet. App. A1-A7). In the court of appeals' view, the Fourth Amendment issue turned on " 'whether the area was such that there was a reasonable expectation of freedom from government intrusion.' " Pet. App. A3 (quoting *Katz* v. *United States*, 389 U.S. 347, 352 (1967)). The court noted that respondent worked in an office containing personal and confidential information with a lock on the door and that it was his stated belief that the office had never been entered without his permission in 17 years. The court also noted that office inventories "were apparently reserved for employees who were departing or were terminated," whereas respondent merely had been placed on administrative leave and was not terminated until the following month. The court concluded that these facts demonstrated that respondent "had a subjective expectation of privacy in his office that society is prepared to recognize and protect as reasonable." Pet. App. A4.

The court of appeals distinguished other decisions finding no reasonable expectation of privacy in the workplace from work-related searches on the ground that "Napa had never instituted surveillance or searches and had no general inspection policy that might have defeated [respondent's] expectation of privacy in his office." Pet. App. A6. The court also considered it irrelevant that "[t]he search of [respondent's] desk was apparently motivated by concern with the whereabouts of a computer and by the impending investigation of [respondent]," rather than by a reason unrelated to respondent's work. *Id.* at A5 n.2. In

short, the court summarily concluded that "the search of [respondent's] office was not a reasonable search under the fourth amendment" (*id.* at A6) and remanded the case for entry of partial summary judgment in favor of respondent and for a hearing to determine the amount of damages (*id.* at A7).

SUMMARY OF ARGUMENT

A. The court of appeals' holding that a government employee has a reasonable expectation that his supervisor will not enter his office without permission does not accord with this Court's Fourth Amendment jurisprudence or the realities of the workplace. An employee is given office space for only one reason: to facilitate his work for his employer. Thus, while an employee may choose to keep personal items in his office, it is ordinarily understood that the office will be used primarily for work-related purposes and will house primarily items that relate to the job. The employer certainly does not relinquish access to his own property simply by assigning it as office space to an employee, and he will still have many legitimate reasons for requiring access. For example, employees working on cooperative projects often need to enter the offices of absent fellow employees to look for government property, such as a case file; supervisors may need to enter an office in the course of their duties to evaluate employee performance.

Thus, this Court has noted that an employee's expectation that his office will not be entered by outsiders does not extend to entries by his employer. *Mancusi* v. *DeForte,* 392 U.S. 364, 369 (1968). The court of appeals seriously erred in ignoring this distinction and instead treating respondent's office as a private enclave. The fact that the office was part of a state hospital and was furnished for the purpose of conducting state business is of crucial importance. Under these circumstances, even if

respondent had a subjective expectation that his office would not be entered by anyone without his consent, society would not recognize such an expectation as reasonable with respect to entries by representatives of his employer.

B. Assuming arguendo that a government employee has a legitimate expectation of privacy in his office that suffices to make the Fourth Amendment applicable to an intrusion by his employer, the court of appeals nonetheless erred in holding that the search of respondents' office was unconstitutional. The Fourth Amendment proscribes only unreasonable searches and, contrary to the court of appeals' apparent assumption, neither a warrant nor probable cause is a prerequisite to a finding of reasonableness. Given the employment situation presented here, these requirements for criminal investigative searches make little sense; the reasons for a supervisor's or co-employee's entry have nothing to do with probable cause and the magistrate would have no useful role to play. See generally *New Jersey* v. *T.L.O.*, No. 83-712 (Jan. 15, 1985).

We submit that in this context it is reasonable under the Fourth Amendment for a supervisor to enter and search an employee's office if the entry is for a legitimate business purpose. While an employee's personal possessions, such as a briefcase or purse, are not subject to search simply because they may be brought to work, an employer retains the authority to search its own office space when necessary for the conduct of its business. In light of the extremely limited privacy interest at stake—an employee's interest in using his government furnished office to store personal items—a more exacting constitutional standard would unduly infringe the government's legitimate interest in effective management of the workplace. See *Connick* v. *Myers*, 461 U.S. 138 (1983).

This standard of reasonableness was surely satisfied here. Petitioners conducted a search of respondent's office, at a time when he was absent on indefinite admini-

strative leave, in order to locate state property in connection with an administrative investigation into his malfeasance on the job.

ARGUMENT

THE ENTRY AND SEARCH OF RESPONDENT'S OFFICE BY HIS EMPLOYER FOR BUSINESS-RELATED REASONS DID NOT VIOLATE THE FOURTH AMENDMENT

The court of appeals has created a regime of Fourth Amendment regulation of the workplace that is completely unsupportable. First, in considering whether respondent had an expectation of privacy in his office, the court ignored the undeniable fact that a government institution, like any other employer, provides an office for its employees in order to facilitate their work for the employer, not to give employees a private preserve in which to transact nongovernment business. Second, the court completely misapplied Fourth Amendment law in reasoning that respondent's expectation of privacy in his office necessarily meant that petitioners' warrantless entry amounted to a constitutional violation. A search violates the Fourth Amendment only if it is "unreasonable," yet the court made no attempt to assess the reasonableness of petitioners' conduct. The decision below, if taken at face value, suggests that Fourth Amendment violations occur whenever government employees enter a co-worker's office to look for a file or to borrow a pencil. This extreme view is not justified by this Court's Fourth Amendment jurisprudence and is not necessary to safeguard the privacy rights of government employees.[4]

[4] Whether or not the search in this case violated the Fourth Amendment, it cannot seriously be contended that petitioners' actions violated "clearly established" constitutional standards. Therefore, qualified immunity should protect petitioners against damages liability under Section 1983. See *Davis* v. *Scherer*, No. 83-490 (June 28, 1984), slip op. 7; *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). The qualified immunity issue apparently was not raised below and cer-

A. A Government Employee Has No Reasonable Expectation That A Supervisor Or Co-Employee Will Not Enter His Office In The Course Of Performing Employment-Related Duties

Since *Katz* v. *United States*, 389 U.S. 347 (1967), the Court has consistently taken the view that the Fourth Amendment applies only where an individual has a "justifiabl[e]" or "legitimate" "expectation of privacy" (*id.* at 353; *Smith* v. *Maryland*, 442 U.S. 735, 740 (1979)). The inquiry whether an area is protected by the Fourth Amendment consists of two parts—"whether the individual by his conduct, has 'exhibited an actual (subjective) expectation of privacy' * * * [and] whether the individual's subjective expectation is 'one that society is prepared to recognize as "reasonable" '—whether * * * the individual's expectation, viewed objectively, is 'justifiable' under the circumstances." *Smith*, 442 U.S. at 740 (quoting *Katz*, 389 U.S. at 353, 361); see also *New Jersey* v. *T.L.O.*, No. 83-712 (Jan. 15, 1985); *Hudson* v. *Palmer*, No. 82-1630 (July 3, 1984); *United States* v. *Knotts*, 460 U.S. 276, 280-281 (1983). While the court of appeals paid lip service to this two-part inquiry, the court's analysis does not seriously attempt to address the objective component of the inquiry. In our view, the nature of the employment relationship and the purpose for which employees are allocated office space suggest that society would not deem it reasonable for an employee to expect his office to be completely free from unconsented entries by his employer or fellow workers. The decision below provides no basis for doubting the correctness of this view.

The court of appeals' finding that respondent had *some* expectation of privacy in his office is unremarkable on its face. In *Mancusi* v. *DeForte*, 392 U.S. 364 (1968), this

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tainly was not addressed by the lower courts. In light of this Court's limited grant of certiorari, we will treat this case as involving solely an issue of substantive Fourth Amendment law.

Court recognized that an employee generally has a sufficient expectation of privacy in the office provided him by his private employer to give him "standing" to challenge a police search of that office. Here, respondent reasonably could have expected that personal possessions in his office would not be exposed to the view of outsiders having no connection with the hospital. That does not mean, however, that he legitimately could have expected that his office would remain free from entry by other workers at the hospital.

It surely cannot be doubted that the reason that an employer provides one of its employees with an office, even an office that is "private" in the sense that the employee does not share the workspace with another employee, is to facilitate the employee's performance of his work for that employer. While the employer recognizes that the employee may elect to keep some personal items in his office, it is plainly the understanding of all concerned that the office will be used primarily for work-related purposes. By the same token, the employer cannot be taken to have surrendered access to its own office space simply by assigning a particular office to an employee. Thus, in *Mancusi*, the Court recognized that the employee's expectation of privacy in his office was qualified by the employment relationship and by the fact that the office remained the property of the employer. The Court described Mancusi's expectation as one that the records in his office would not be taken or touched without "his permission *or that of his union superiors*" (392 U.S. at 369 (emphasis added)).

The court of appeals' decision fails to take cognizance of these elementary principles. Relying largely on respondent's assertions and subjective impressions, the court assumed that the hospital retained no cognizable interest in the office space that it assigned to respondent. The court apparently credited respondent's assertion that he believed that he possessed the only key to his office and

that no one had entered it without his permission in 17 years. The court also stated that no state records and files were located in respondent's office, apparently accepting respondent's declaration that the office contained no state property (other than furniture) but instead was used to store his personal possessions. See Pet. App. A2, A4 n.1; Ortega Declaration ¶ 5. The court viewed the office as respondent's private enclave—one that was untainted either by entry by any co-workers or by the presence of any materials relating to hospital business. Under the court of appeals' approach, therefore, the fact that the office was located in the state hospital is an irrelevant happenstance, and the case should be treated the same as if petitioners had searched an office owned or leased by respondent many miles from state property.

We find respondent's assertions concerning the private nature of his hospital office to be inherently incredible; the taxpayers of California ought to be entitled to assume that they are not providing office space and furniture solely for a state employee's private use.[5] Thus, we question whether respondent can be said even to have had a "subjective" expectation that his supervisors or fellow employees would not enter his office without his express permission. It is

[5] Respondent's assertions are belied to some extent by the limited record made in this case. Obviously, the hospital did have another key to respondent's office, which is what petitioners used to enter the office to conduct the inventory. It would be quite irresponsible for a state institution to give an employee its only key to state property, thereby requiring the state to break the lock or somehow force entry in the event that the employee lost the key or was unavailable. In addition, respondent's secretary declared that respondent left his door ajar during the work day and that he sometimes took the files relating to hospital residents into his office. Ciraulo Declaration 2.

At any rate, in the absence of any fact finding by the district court, the court of appeals plainly was not entitled to rely on these assertions to order the entry of judgment for respondent. At most, it should have vacated the entry of summary judgment for petitioners and ordered the district court to hold a trial to resolve disputed questions of fact.

not necessary for the Court to consider these factual matters, however, because, even if respondent did take unusual steps to give himself a greater subjective expectation of privacy in his office than most employees have, his expectation was not one that society ought to recognize as reasonable. The fact that the office searched here belonged to the State, was located on state property, and was provided to respondent for use in performing his duties as a state employee is not an irrelevant happenstance; rather, it is the critical aspect of this case. The realities of the workplace simply do not justify giving an employee the same constitutional protection in his government-furnished office—with respect to privacy from intrusions by his supervisor or co-workers—that he has in his home.

It cannot seriously be disputed that in the ordinary course of business many employment situations occasionally involve routine unconsented entries into an employee's office for work-related purposes. Cooperative projects often require one employee to enter another's office to borrow a book or to look at a case file. Moreover, apart from these everyday sorts of entries, there periodically will be situations in which a supervisor needs to enter an employee's office for a special reason. For example, when an employee is unexpectedly absent for a length of time, it may be necessary for a supervisor to retrieve documents or to inventory the contents of the employee's work area in order to maintain the efficiency of the office. (Here, for example, the entry occurred while respondent was on indefinite administrative leave.) Finally, a supervisor may need to enter an office as part of his responsibility to oversee employee performance, particularly when he has reason to suspect substandard performance or misconduct. Thus, because of the ordinary operation of the workplace and because of the employer's interest in effectively managing its business, an employee must be aware that from time to time the interior of his

office, including items left in the office, will be exposed to the view of his business associates. Accordingly, an entry by a supervisor into an employee's office is not an intrusion into an area in which there is a legitimate expectation of privacy, and hence does not implicate the protections of the Fourth Amendment.

The fact that the employer here is the State does not alter this conclusion, because the important interests in effective management noted above apply equally whether the employer is a private person or a government. This Court has long recognized the government's legitimate interest in "promot[ing] efficiency and integrity in the discharge of official duties, and * * * maintain[ing] proper discipline in the public service." *Ex parte Curtis*, 106 U.S. 371, 373 (1882). The Court has also noted, in the First Amendment context, that "government officials should enjoy wide latitude in managing their offices." *Connick* v. *Myers*, 461 U.S. 138, 146 (1983). See also *Kelley* v. *Johnson*, 425 U.S. 238, 247 (1976); *Arnett* v. *Kennedy*, 416 U.S. 134, 168 (1974) (opinion of Powell, J.); *Cafeteria & Restaurant Workers Union, Local 473* v. *McElroy*, 367 U.S. 886, 896-898 (1961). Therefore, even assuming that government employees are entitled to special Fourth Amendment protection vis-a-vis their employers that their counterparts in the private sector lack (see *New Jersey* v. *T.L.O.*, No. 83-712 (Jan. 15, 1985), slip op. 8-10), their status as government employees does not confer upon them a unique expectation of privacy that insulates them from intrusions that would otherwise be anticipated as a normal part of the employment relationship. In other words, the Fourth Amendment protection afforded government employees is triggered when a legitimate expectation of privacy is unreasonably infringed, but the Constitution does not operate to broaden that expectation of privacy. And the privacy considerations must be assessed in the particular context of the employment relationship,

because the government enjoys a freedom to act with respect to its own employees on internal government matters that it would not have with respect to the public in general. See *Connick*, 461 U.S. at 147.

Against this background, the court of appeals failed to explain why respondent had an objectively reasonable expectation to be free from unconsented entries by representatives of his employer. The court of appeals seems to have relied entirely on the fact that Napa had no well established policy that would have put respondent on notice that his office was subject to entry by a supervisor in the precise fact situation presented here. See Pet. App. A6.[6] But this factor cannot be dispositive of the question of a legitimate expectation of privacy. On the one hand, if there is a sufficient weighty privacy interest at stake, the government may not eliminate Fourth Amendment protection simply by announcing its intention to do so; for example, public notice that houses will be subject to warrantless searches would not eliminate the constitutional objection to such searches. On the other hand, if there is no legitimate privacy interest at stake, one is not created simply by the absence of an announced government policy of searches or even by an individual's unilateral assertion of a privacy interest. See *Oliver* v. *United States*, 466 U.S. 170 (1984).[7] Moreover, the rule proposed by the court of appeals is hardly calculated to contribute to the protection

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[6] The court of appeals' premise may well be incorrect. The court acknowledged petitioner's contention that it was "established hospital policy * * * to inventory property in the offices of departing or terminated employees to determine which property was state property and which was personal" (Pet. App. A3). The situation involving respondent, who was placed on leave because of a pending investigation that, as expected, led to his termination the following month, fell quite close to, if not within, this policy.

[7] We do not suggest that the existence of an established policy is completely irrelevant. On the contrary, if there were a published regulation here notifying state employees that their offices were sub-

of privacy in the workplace. It would encourage employers to search their employees' offices *more* frequently in order to establish a practice that would then justify a search in those situations in which a search was truly necessary. There is no reason why the Fourth Amendment ought to allow such indiscriminate searches and yet prohibit searches that are performed only in more focused and selective instances.

In sum, there is no basis for concluding that respondent had a legitimate expectation that his office would not be entered by his supervisor or fellow employees. The office remained government property, and respondent had no right to exclude other employees engaged in government business.[8] While a person may have an expectation of privacy from strangers to a particular area, he can hardly expect to maintain a similar privacy from persons—such as his employer's authorized representative—who have an equal or greater right of access to the area. See generally *United States* v. *Matlock*, 415 U.S. 164 (1974); see also

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ject to entry and search by their supervisors, respondent's claim of a subjective expectation of privacy would be frivolous. Indeed, such an established employment policy could justify a considerably more significant privacy intrusion than what occurred here; as long as the policy was reasonable, the employee could hardly complain about what he consented to as a condition of his employment. See *Chenkin* v. *Bellevue Hospital Center*, 479 F.Supp. 207 (S.D.N.Y. 1979) (state hospital anti-theft policy requiring employees to make parcels available for inspection upon exiting the hospital). But the absence of such an established policy does not itself confer an expectation of privacy where one does not otherwise exist.

[8] Respondent, like most employees, no doubt had a right to exclude *outsiders* from his office, but that right is one that is exercised derivatively on behalf of the employer; it would not justify excluding representatives of the employer. Even a right to exclude, of course, does not necessarily suffice to confer an expectation of privacy for Fourth Amendment purposes. See *Oliver* v. *United States, supra.*

Mancusi, 392 U.S. at 369-370; *United States* v. *Reeves*, 730 F.2d 1189, 1193-1194 (8th Cir. 1984); *United States* v. *Gargiso*, 456 F.2d 584, 586-587 (2d Cir. 1972). Accordingly, the court of appeals erred in holding that petitioners' entry into respondent's office violated a reasonable expectation of privacy.

B. A Supervisor Or Co-employee's Search Of An Employee's Office Is Reasonable If It Is Undertaken For A Legitimate Employment-Related Purpose

Even if an employee is held to have a reasonable expectation that his superiors or fellow workers will not generally enter his office without permission, the court of appeals' decision is still unsupportable.[9] The court of appeals *concluded* its analysis with its finding that respondent had a legitimate expectation of privacy, but such a finding is only the beginning of the inquiry. The Fourth Amendment prohibits only *unreasonable* searches and seizures, and "what is reasonable depends on the context within which a search takes place." *New Jersey* v. *T.L.O.*, slip op. 10.

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[9] The court of appeals did not distinguish between the entry into the office here and the further search that took place, but it appears undisputed that petitioners looked through respondent's desk and filing cabinet in an attempt to identify materials belonging to the State. While we maintain that it is clearly unreasonable for an employee to expect his office to be free from entries by supervisors and fellow employees in the normal course of business, we acknowledge that there are areas within an office, such as the interior of a desk, that present a closer question with respect to the existence of a legitimate expectation of privacy. Cf. *Mancusi* v. *DeForte*, 392 U.S. at 377 (White, J., dissenting). It is unnecessary to decide in this case whether respondent may have had a reasonable expectation of privacy in parts of his office, because, as we explain below (see pages 16-22, *infra*), petitioners' intrusion was reasonable within the meaning of the Fourth Amendment.

The court of appeals did not explain why the entry here was unreasonable, but it cannot seriously have meant to hold that petitioners could not constitutionally have entered respondent's office under *any* circumstances. Rather, it seems to have assumed that any intrusion into a legitimate expectation of privacy (or at least an intrusion that is in part investigatory (see Pet. App. A6)) is automatically unreasonable in the absence of a warrant based on probable cause.[10] There is no justification, however, for importing these requirements, which are generally applicable when an individual is singled out on the basis of suspicion of criminal activity, into the employment context. The concepts of a search warrant and criminal probable cause have no application to the sort of "searches" involved here, which were simply part of the ordinary employee/employer relationship and were not designed to ferret out evidence of criminal activity. "The standard of probable cause is peculiarly related to criminal investigations, not routine, non-criminal procedures." *South Dakota* v. *Opperman*, 428 U.S. 364, 370 n.5 (1976).

By the same token, it makes no sense to require government supervisors to obtain an "administrative warrant" to enter their subordinates' offices. These entries are not based on administrative probable cause either; they are not justified as part of a neutral administrative plan in furtherance of regulatory requirements (see *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 323 (1978)). Interposition of the judgment of a neutral magistrate would serve no purpose. It is simply not "reasonable," either in common sense or Fourth Amendment terms, to expect a fellow employee to apply to a magistrate for a warrant every time he needs to enter an employee's office to look for a

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[10] Respondent's brief in the court of appeals also did not discuss why the search was unreasonable, but, on those few occasions that the brief did advert to the issue (at 7, 17, 18), it complained about the absence of a search warrant.

case file or to inventory government property or to obtain information to assist in an investigation of the employee's performance. See generally *New Jersey* v. *T.L.O.*, slip op. 13-14.[11] The contrary rule adopted by the court of appeals runs afoul—in extreme fashion—of "the common-sense realization that government offices could not function if every employment decision became a constitutional matter" (*Connick* v. *Myers*, 461 U.S. at 143 (footnote omitted)).

The view that petitioners' actions here could have invaded a legitimate expectation of privacy, thereby invoking the protections of the Fourth Amendment, yet still be constitutional in the absence of a warrant and probable cause is fully consistent with established precedent of this Court. It has long been recognized that even in the criminal investigation context, "the Fourth Amendment imposes no irreducible requirement of [individualized] suspicion" or a warrant. *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 561 (1976); see also *Terry* v. *Ohio*, 392 U.S. 1 (1968). And just last Term, the Court emphasized that these requirements did not apply in the special setting of a school, even where the case involved the discovery of illegal drugs in a student's purse. *New Jersey* v. *T.L.O.*, slip op. 10-16. The relationship between employer and employee, like that between school authorities and students, is quite distinct from that between law enforcement officers and criminal suspects.[12]

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[11] Indeed, the implicit premise of the court of appeals' decision is quite dubious; it is not apparent that a magistrate would even have the authority to issue such a warrant, which would not entail an assessment of probable cause or any other standard that could reasonably be said to be within the magistrate's ken. See Fed. R. Crim. P. 41.

[12] If there is an analogy in the criminal area to the sort of Fourth Amendment claim brought by respondent here, it lies in the "inventory search" cases. The Court has recognized that incident to booking and jailing a criminal suspect, the police may search his possessions, including personal items such as a pocketbook, for inventory pur-

"[T]he overarching principle * * * embodied in the Fourth Amendment" is one of " 'reasonableness.' " *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 588 (1983). That "reasonableness" determination is made by "balanc[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *United States* v. *Place*, 462 U.S. 696, 703 (1983); *Delaware* v. *Prouse*, 440 U.S. 648, 654 (1979). We submit that the "reasonableness" test of the Fourth Amendment is satisfied in this context if the employer's search of an employee's office is reasonably related to the performance of his duties, *i.e.*, if it is pursuant to a legitimate business purpose. These justifiable purposes should not be restricted to innocuous entries intended to facilitate particular projects, but should also extend to entries to inventory or search for government property and entries to assist in evaluating an employee's performance, even if he is suspected of misconduct.

This standard takes account of the strong governmental interest in effective management of the workplace (see pages 11-13, *supra*), while still according some degree of protection to an employee's quite limited interest in using his government-furnished office for the storage of personal items that he would prefer not to have exposed to his fellow employees. Moreover, the standard sensibly equates the special Fourth Amendment protection that is accorded to an employee because of the happenstance that he works for the government with the ordinary expectation of privacy (albeit not of constitutional dimension) that an employee would have in the private sector.

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poses, without probable cause or a warrant. *Illinois* v. *Lafayette*, 462 U.S. 640 (1983); *South Dakota* v. *Opperman*, *supra*. An inventory search is not based on a reason to suspect that evidence will be found, but rather it is justified on the basis of a range of government interests relating to the efficient operation of the police station. See *Lafayette*, 462 U.S. at 646-647.

The lower courts have consistently applied this kind of approach in assessing the validity of workplace searches. The first case to address the question was *United States* v. *Blok*, 188 F.2d 1019 (D.C. Cir. 1951). In *Blok*, the court held invalid a warrantless police search of the desk of a government employee who was suspected of petty larceny. Anticipating *Mancusi*, the court held that the employee's exclusive right to use the desk gave her standing to challenge the search, which it found to be unreasonable. The court added, however, that "[n]o doubt a search of [the desk] without her consent would have been reasonable if made by some people in some circumstances. Her official superiors might reasonably have searched the desk for official property needed for official use." *Id.* at 1021.[13]

Similarly, in *United States* v. *Bunkers*, 521 F.2d 1217, 1220 (9th Cir.), cert. denied, 423 U.S. 989 (1975), the court stated that a postal employee could not seriously maintain a reasonable expectation of privacy from a search by postal inspectors of her government-supplied locker for fruits of a work-connected crime, *viz.*, stealing postal parcels. The court upheld the warrantless search, though it reserved the question whether a different result would be in order if the search were "not work connected." 521 F.2d at 1220 n.1; see also *United States* v. *Sanders*, 568 F.2d 1175 (5th Cir. 1978). And in *United States* v. *Collins*, 349 F.2d 863, 867-868 (2d Cir. 1965), cert. denied, 383 U.S. 960 (1966), the court stated that it had "no doubt that the search of defendant's work area, including the surface and interior of his deck, conducted by [a Customs agent] was a constitutional exercise of the power of the Government as defendant's employer, to supervise and investigate the per-

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[13] The issue presented in *Blok* concerning whether a law enforcement officer could search the desk of a government employee for evidence of a non-work-related crime pursuant to consent of a supervisor is not presented here, and we express no view as to how it should be resolved.

formance of his duties as a Customs employee." See also *Williams* v. *Collins*, 728 F.2d 721, 728 (5th Cir. 1984) ("It is by no means certain that Williams had a reasonable expectation of privacy in his government-furnished desk, in relation to the possibility of his supervisors entering the desk as part of an investigation of Williams' job performance or as part of an office inventory."); *United States* v. *Nasser*, 476 F.2d 1111, 1123 (7th Cir. 1973) ("element of work-relatedness" is basis for assessing validity of supervisor's search).[14] Thus, whether cast in terms of a lack of expectation of privacy or reasonableness, the courts have consistently recognized that an area furnished to a government employee for use in performing his duties is not protected from a work-related search by a superior, including searches occasioned by concern about the employee's misconduct.

This line of authority plainly comports with the Fourth Amendment, and application of the principles it reflects makes clear that petitioners' actions were constitutional. Indeed, this case is considerably easier than many of the cases cited above, which involved searches of areas (such as lockers) set aside primarily for storage of personal items or searches designed to confirm suspicions of criminal (albeit work-related) activity. Here, the search was conducted primarily for inventory purposes, *i.e.*, to identify

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[14] *Gillard* v. *Schmidt*, 579 F.2d 825 (3d Cir. 1978), on which the court of appeals primarily relied, is fully in accord with these decisions. In that case a member of the Board of Education was upset by an unflattering cartoon that appeared in a newspaper. Acting on a tip, he searched the desk of a school guidance counselor in an effort to determine the identity of the cartoonist. The court of appeals held that the search violated the Fourth Amendment. The court specifically noted, however, that it had no occasion to consider the line of authority upholding searches for work-related reasons because there was no claim that the board member was acting to recover government property or to monitor the guidance counselor's performance of his official duties. 579 F.2d at 829 n.1.

state records in connection with a pending administrative investigation of respondent (which was directed at his malfeasance in office, not at uncovering criminal activity). And it was performed at a time when respondent was absent from work indefinitely on involuntary administrative leave. An inventory search may be performed at a police station without any suspicion of uncovering evidence of a crime, so long as there is reasonable justification for the inventory (see *Illinois* v. *Lafayette*, 462 U.S. 640 (1983)). It would seem to follow *a fortiori* that an office inventory may be performed in furtherance of a supervisor's duties. Unlike the stationhouse inventory, which may involve the most personal of possessions, the inventory in the work setting is limited to property that belongs to the government and from which the employee has no right to exclude his employer.

We emphasize that this would be a different case if petitioners had searched a private item found in the office, such as a briefcase or a purse or a file of papers whose cover clearly showed it to be non-work-related.[15] Employees have a far stronger expectation of privacy in such personal effects (see, *e.g.*, *Arkansas* v. *Sanders*, 442 U.S. 753, 762 (1979)), and the government's need to search for business-related reasons is substantially less compelling. A supervisor would not be entitled to search an employee's briefcase if the employee were holding it while

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[15] *New Jersey* v. *T.L.O.*, *supra*, was such a case. There, a school official searched a student's pocketbook, an item infused with a strong degree of privacy. Thus, the fact that the Court applied a reasonable suspicion standard in *T.L.O.* (while noting that it did not preclude the possibility that a lesser standard would suffice (slip op. 15 & n.8)) does not suggest that such a standard would be appropriate here. Indeed, the Court in *T.L.O.* expressly reserved the question whether a student had any expectation of privacy in school-provided storage areas such as desks or lockers (slip op. 11 n.5).

standing on a street corner, and the briefcase does not lose all protection simply because it happens to be in a government office at a particular time.[16] But a government office or a government-furnished desk or file cabinet is different; an employee cannot reasonably expect to have a right to deny his supervisor or co-employee access to such government property.

In sum, the court of appeals manifestly erred in finding a Fourth Amendment violation here. This case does not involve a search by law enforcement agents for the purpose of investigating criminal activity or compliance with regulatory requirements. It does not involve a search by a supervisor for reasons unrelated to a legitimate business purpose. It does not involve an intrusion into a private possession of an employee, such as a briefcase, or an area specifically set aside for storage of personal items. Rather, it involves an entry into an employee's workspace furnished to him by the State to facilitate his work for the State. The search was conducted at the direction of respondent's supervisor for the legitimate purpose of accounting for state property in the office, while respondent was suspended pending an administrative investigation that would shortly lead to his termination. Moreover, the entry was triggered in part by the revelation that respondent had violated the terms of his suspension by entering his office and removing what was reasonably thought to be state property. The court of appeals' view that, in these circumstances, the Fourth Amendment prohibited the entry into respondent's office cannot be countenanced.

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[16] *United States* v. *Speights*, 557 F.2d 362 (3d Cir. 1977), appears to reflect this distinction. There the court invalidated an employer search of a locker issued to police officers for storage of their personal belongings, relying heavily on the fact that the employees had been permitted to use private locks that could not be opened by the employer.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DENNIS M. O'CONNOR, *et al.*,
Petitioners,

v.

MAGNO J. ORTEGA,
Respondent,

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO AS AMICUS CURIAE SUPPORTING RESPONDENT

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TABLE OF CONTENTS

	Page
INTEREST OF THE AMICUS CURIAE	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. Ortega Had A Reasonable Expectation Of Privacy In His Office	4
A. Occasional, Consensual, And Limited Intrusions By Fellow Employees Did Not Deprive Ortega Of His Reasonable Expectation Of Privacy	7
B. Governmental Needs Cannot Deprive Ortega Of His Reasonable Expectation Of Privacy	10
C. Ortega's Reasonable Expectation Was That Neither The Police Nor His Employer Or Its Security Force Would Invade His Privacy	11
D. Government Offices Should Not Be Categorically Excluded From Fourth Amendment Protection	13
II. The Searches Of Ortega's Office Were Unreasonable	15
A. The Searches Were Per Se Unreasonable Because They Were Conducted Without A Warrant	15
B. The Searches Violated All Standards Of Reasonableness Yet Established Under The Fourth Amendment	21
C. The Standard Proposed By Petitioners Would Wholly Deprive Public Employees Of Fourth Amendment Protection	23
CONCLUSION	25

TABLE OF AUTHORITIES

Cases: Page

Arkansas v. Sanders, 442 U.S. 753 (1979) 15
Berger v. New York, 388 U.S. 41 (1967) 4, 15
Bishop v. Wood, 426 U.S. 341 (1976) 21
Board of Regents v. Roth, 408 U.S. 564 (1972) 18
Burdeau v. McDowell, 256 U.S. 465 (1921) 13
Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v. McElroy, 367 U.S. 886 (1961) .. 19
Camara v. Municipal Court, 387 U.S. 523 (1967) 12, 13, 15, 16
Chapman v. United States, 365 U.S. 610 (1961) 5, 9
Chenkin v. Bellevue Hospital Center, 479 F.Supp. 207 (S.D.N.Y. 1979) 7
Chimel v. California, 395 U.S. 752 (1969) 15
Chocallo v. Bureau of Hearings and Appeals, SSA, 548 F.Supp. 1349 (E.D. Pa. 1982) 7, 20
Cleveland Board of Education v. Loudermill, 105 S.Ct. 1487 (1985) 18
Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974) 18
Connick v. Myers, 461 U.S. 138 (1983) 18
Davis v. United States, 328 U.S. 582 (1946) 7, 22
Donovan v. Dewey, 452 U.S. 594 (1981) 4, 13
Ex Parte Jackson, 96 U.S. 727 (1877) 19
G.M. Leasing Corp. v. United States, 429 U.S. 338 (1977) 4, 15
Gillard v. Schmidt, 579 F.2d 825 (3d Cir. 1978) 5, 6
Givhan v. Western Line Consolidated Schools, 439 U.S. 410 (1974) 18
Hoffa v. United States, 385 U.S. 293 (1966) 4, 8
Hudson v. Palmer, 104 S.Ct. 3194 (1984) 14, 17
Jafree v. Scott, 372 F.Supp. 264 (N.D. Ill. 1974) 7
Johnson v. United States, 333 U.S. 10 (1984) 16
Jones v. United States, 362 U.S. 257 (1960) 5
Katz v. United States, 389 U.S. 347 (1967) 4, 5, 6, 14, 15
Lanza v. New York, 370 U.S. 139 (1962) 15
Lewis v. United States, 385 U.S. 206 (1966) 8
Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979) .. 8

TABLE OF AUTHORITIES—Continued

	Page
Mancusi v. DeForte, 392 U.S. 364 (1968)	4, 5, 8, 10, 15
Marshall v. Barlow's, Inc., 436 U.S. 307 (1978)	4, 13, 15, 19
Michigan v. Tyler, 436 U.S. 499 (1978)	13
Mincey v. Arizona, 437 U.S. 385 (1978)	15, 16, 21, 22
Mt. Healthy City School District v. Doyle, 429 U.S. 274 (1977)	18
New Jersey v. T.L.O., 105 S.Ct. 733 (1985)	13, 14, 16, 22, 24
Oliver v. United States, 104 S.Ct. 1735 (1984)	4, 5
Pickering v. Board of Education, 391 U.S. 563 (1968)	18
Rakas v. Illinois, 439 U.S. 128 (1978)	5
Rawlings v. Kentucky, 448 U.S. 98 (1980)	5, 6
Schmerber v. California, 384 U.S. 757 (1966)	11
See v. Seattle, 387 U.S. 541 (1967)	4, 13
Shaffer v. Field, 339 F.Supp. 997 (E.D. Pa. 1967)	11
Silverman v. United States, 365 U.S. 505 (1961)	4
Smith v. Maryland, 442 U.S. 735 (1979)	7
Stanley v. Illinois, 405 U.S. 645 (1972)	17
Stoner v. California, 376 U.S. 483 (1964)	5, 9
Terry v. Ohio, 392 U.S. 1 (1968)	8, 21, 22
United States v. Blok, 188 F.2d 1019 (D.C. Cir. 1951)	10
United States v. Bunkers, 521 F.2d 1217 (9th Cir. 1975)	11
United States v. Chadwick, 433 U.S. 1 (1977)	5, 6, 15, 17
United States v. Collins, 349 F.2d 863 (2d Cir. 1965)	11
United States v. Donato, 269 F.Supp. 921 (E.D. Pa. 1967)	11
United States v. Gargiso, 456 F.2d 584 (2d Cir. 1972)	10
United States v. Jeffers, 342 U.S. 48 (1951)	15
United States v. Kahan, 350 F.Supp. 784 (S.D.N.Y. 1972), *aff'd*, 479 F.2d 290 (2d Cir. 1973), *rev'd on other grounds*, 415 U.S. 239 (1974)	10, 11
United States v. Matlock, 415 U.S. 164 (1974)	9

TABLE OF AUTHORITIES—Continued

	Page
United States v. *McIntyre*, 582 F.2d 1221 (9th Cir. 1978)	11
United States v. Place, 462 U.S. 696 (1983)	16
United States v. Ross, 456 U.S. 798 (1982)	15
United States v. Salvucci, 448 U.S. 83 (1980)	5
United States v. Sanders, 568 F.2d 1175 (9th Cir. 1975)	11
United States v. Speights, 557 F.2d 362 (3d Cir. 1977)	5
Walter v. United States, 447 U.S. 649 (1980)	19
Warden v. Hayden, 387 U.S. 294 (1967)	5, 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-530

DENNIS M. O'CONNOR, *et al.*,
Petitioners,

v.

MAGNO J. ORTEGA,
Respondent,

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE AMICUS CURIAE

The American Federation of State, County and Municipal Employees, AFL-CIO (AFSCME) is an association of over one million employees of state, county and municipal governments. The decision in this case will affect the right of all AFSCME's members to privacy in their workplaces.

AFSCME submits this brief with the consent of the parties pursuant to the Rules of the Court.

STATEMENT OF THE CASE

Respondent Magno J. Ortega is a physician and psychiatrist and was at all times material to this case Chief of Professional Education at Napa State Hospital. Petitioner Dennis M. O'Connor was the Hospital's Executive Director; Petitioner Richard Friday, the Hospital Administrator; and Petitioner Dorothy Owen, the Hospital's Personnel Officer.

During the summer of 1981, O'Connor began an investigation of Ortega based on several charges of misconduct. O'Connor subsequently placed Ortega on administrative leave. O'Connor appointed a three-person committee to conduct the investigation, including Jim Stratton, a member of the Hospital's police force. As part of the investigation, Petitioners authorized Stratton to enter Ortega's private office in the Hospital and conduct a search of all items in the office, including Ortega's desk and file cabinet.

Ortega had occupied his private office for 17 years. His name was on the door. Ortega kept the office locked when he was not inside and believed he possessed the only key. Prior to the searches at issue, no one had entered the office without Ortega's permission.

Without requesting Ortega's consent, without allowing Ortega to be present, and without first requesting that Ortega produce any item for inspection, Stratton entered Ortega's office on each of more than seven days. On each of these days Stratton spent several hours sifting through the contents of Ortega's office. Petitioners did not segregate or retain any State property found in the office. Rather, after the searches, the contents of the office were placed in boxes and made available to Ortega. The only items retained as a result of the searches were several purely personal items—a photograph of a woman friend, a valentine, and a book of poetry given to Ortega as a gift—which were subsequently used as evidence against Ortega

in an administrative proceeding relating to the termination of his employment.

Ortega filed suit in the United States District Court for the Northern District of California pursuant to 42 U.S.C. § 1983, alleging a violation of his right to be free from unreasonable search and seizure under the Fourth Amendment of the United States Constitution. Cross-motions for summary judgment were filed and the Court granted summary judgment in favor of the Defendants.

Ortega appealed to the United States Court of Appeals for the Ninth Circuit. The Court of Appeals reversed and directed the trial court to grant partial summary judgment on the question of liability in favor of Ortega. 764 F.2d 703 (9th Cir. 1985).

SUMMARY OF ARGUMENT

Ortega had a reasonable expectation of privacy in his office. Routine entry by fellow employees did not deprive Ortega of this expectation as Ortega reasonably expected all such entries would be preceded by a request and his consent. In addition, the scope of these routine intrusions was not comparable to the repeated, comprehensive, and nonconsensual search of the entire office and its contents. Ortega's reasonable expectation of privacy extended not simply to the police, but also to his employers, who were also state actors, and the internal security force at his employers' direction.

The searches of Ortega's office were unreasonable because they were conducted without a warrant in the absence of exigent circumstances. Moreover, the searches violated any standard of reasonableness because their scope far exceeded the circumstances which allegedly justified their inception.

ARGUMENT

I. Ortega Had A Reasonable Expectation Of Privacy In His Office

Petitioners conducted repeated searches of Ortega's private office, including his desk and file cabinet. There is no question that Ortega had a reasonable expectation of privacy in his private office as well as in the desk and file cabinet located in his office. This Court has held many times that both employers and employees have a reasonable expectation of privacy in their place of work. *See, e.g., Berger v. New York*, 388 U.S. 41, 64 (1967); *Donovan v. Dewey*, 452 U.S. 594, 598 (1981); *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 353 (1977); *Hoffa v. United States*, 385 U.S. 293, 301 (1966); *Katz v. United States*, 389 U.S. 347, 352, 359 (1967); *Mancusi v. Deforte*, 392 U.S. 364, 367-69 (1968); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312 (1978); *See v. Seattle*, 387 U.S. 541, 543 (1967); *Silverman v. United States*, 365 U.S. 505, 512 (1961). This Court stated in *Oliver v. United States*, 104 S.Ct. 1735 (1984), "The Fourth Amendment's protection of offices and commercial buildings, in which there may be legitimate expectations of privacy, is . . . based upon societal expectations that have deep roots in the history of the amendment." *Id.* at 1741 n.8. Even earlier, this Court noted forcefully that "in light of" this history and "this Court's clear holdings to the contrary," the proposition "that business premises are not protected by the Fourth Amendment . . . could not be defended." *G.M. Leasing Corp.*, 429 U.S. at 353.

The fact that Ortega did not own the office does not render his expectation of privacy in the office unreasonable. Title is not a prerequisite to Fourth Amendment protection. This Court has long refused to rest its holdings in this area on the law of property. "[C]apacity to claim the protection of the Amendment depends not upon

a property right in the invaded place but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion." *Mancusi*, 392 U.S. at 368. *See also United States v. Salvucci*, 448 U.S. 83, 91 (1980); *Katz*, 389 U.S. at 353; *Warden v. Hayden*, 387 U.S. 294, 304, 305 (1967); *Chapman v. United States*, 365 U.S. 610, 617 (1961); *Jones v. United States*, 362 U.S. 257, 266 (1960). Tenants, *Chapman*, occupants of hotel rooms, *Stoner v. California*, 376 U.S. 483, 490 (1964), guests, *Jones*, and employees, *Mancusi*, all enjoy the protections of the Fourth Amendment. *See also Gillard v. Schmidt*, 579 F.2d 825, 829 (3d Cir. 1978) (high school guidance counselor had reasonable expectation of privacy in his desk); *United States v. Speights*, 557 F.2d 362 (3d Cir. 1977) (police office had reasonable expectation of privacy in his locker).

Ortega's office was a private office. He did not share it with any other person. His name was on the door and he had occupied the office for seventeen years. J.A. at 14 (Ortega Declaration ¶ 4). Ortega had a right to exclude other people from his office. *See Rawlings v. Kentucky*, 448 U.S. 98, 106 (1980); *Rakas v. Illinois*, 439 U.S. 128, 149 (1978). He kept the door locked at all times while he was not in the office and he believed he had the only key. J.A. at 14 (Ortega Declaration ¶ 4); *id.* at 21 (Ciraulo Declaration ¶ 4). No one had entered the office without Ortega's permission during his tenure. *Id.* at 14 (Ortega Declaration ¶ 5).

The activities which a physician might engage in inside such an office are "of a kind in which people should be able to engage without fear of intrusion by private persons or government officials." *Oliver*, 104 S.Ct. at 1748 (Marshall, J., dissenting). *See also Rakas*, 439 U.S. at 153 (1978) (Powell, J., concurring); *United States v. Chadwick*, 433 U.S. 1, 13 (1977); *Katz*, 389 U.S. at 352-53. A doctor might meet with patients, maintain confi-

dential files,[1] work on sensitive research, and store a host of purely personal items in his private office.[2] A doctor certainly has a reasonable expectation that such activities and materials will remain private. *Cf. Gillard*, 579 F.2d at 828 (guidance counselor had "reasonable expectation" that "desk containing psychological profiles and other confidential student records would remain safe from prying eyes").

Ortega did nothing to expose the activities within or the contents of his office to public view. Rather, he "took normal precautions to maintain his privacy." *Rawlings*, 448 U.S. at 106; *Chadwick*, 433 U.S. at 11; *Katz*, 389 U.S. at 352.

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[1] Petitioner O'Connor admitted that Ortega had private patients, that he could meet them in his office, and that the files of these patients were reviewed during the searches. J.A. at 44-45 (O'Connor Deposition at 60-61).

[2] Ortega identified the following items as among those seized during the searches:

a. purely personal correspondence from friends and family;
b. photographs of friends, acquaintances, and family;
c. medical files and correspondence from private patients unconnected to Napa State Hospital;
d. appointment books and personal notes, as well as official appointments;
e. personal financial records and accounts;
f. a file approximately 18 feet long of IBM cards containing teaching aids and notes;
g. personal souveniers, gifts and presents belonging to plaintiff;
h. copyrighted manuscript.

J.A. at 14 (Ortega Declaration ¶ 21). Several of these items, including a photograph of a woman friend, a valentine, and a book of poetry given to Ortega as a gift, were subsequently used as evidence against Ortega in the removal proceedings. *Id.* at 15 (¶¶ 22-24); II Record Tab 27, Ortega Declaration Exhibits K, K-1, K-2; III Record Tab 30, Stratton Deposition at 61; J.A. at 43 (O'Connor Deposition at 51).

Petitioners did nothing to deprive Ortega of his expectation of privacy.[3] They did not have an explicit policy authorizing search of doctors' offices nor did they routinely conduct such searches.[4]

A. *Occasional, Consensual, And Limited Intrusions By Fellow Employees Did Not Deprive Oretga Of His Reasonable Expectation Of Privacy*

Petitioners argue that Ortega, like any employee, must expect occasional intrusions by his employer or fellow employees "to obtain a file or piece of correspondence, or borrow a paper clip." Brief for Petitioners at 16. But Ortega's reasonable expectation was that even these minimal intrusions would be preceded by a request and his consent. *Cf. Davis v. United States*, 328 U.S. 582, 593 (1946) (demand for government owned ration coupons preceded seizure); *Chocallo v. Bureau of Hearings and Appeals, SSA*, 548 F. Supp. 1349, 1363-64 (E.D. Pa. 1982) (request to relinquish file preceded search).

Moreover, even regular visits of this unintrusive type would not deprive Ortega of his reasonable expectation that his entire office, including his desk and files, would

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[3] The United States as amicus curiae suggests that it might have been hospital policy to inventory property in the offices of departing employees. Brief of United States at 13 n.* (typescript). At the time of the searches, however, Ortega had not been terminated. Moreover, an employee would certainly reasonably expect that he or she would be present at any such predeparture inventory since its only legitimate purpose would be to prevent the employee from taking any public property. *See, e.g., Jafree v. Scott*, 372 F.Supp. 264, 273-74 (N.D. Ill. 1974).

[4] Moreover, the government cannot, contrary to the assertion of the United States as amicus curiae, Brief of United States at 13 n.* (typescript), adopt such a policy or practice and thereby simply deprive employees of their expectation of privacy. *See Smith v. Maryland*, 442 U.S. 735, 740 n.5 (1979); *Chenkin v. Bellevue Hospital Center*, 479 F.Supp. 207, 211 (S.D. N.Y. 1979).

not be searched. The scope of a search is critical to its constitutionality under the Fourth Amendment. "This court has held in the past that a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope." *Terry v. Ohio*, 392 U.S. 1, 17-18 (1968) (and cases cited therein). Even if Ortega could not reasonably expect that fellow employees would never enter his office, he could legitimately expect that they would not sort through his desk and files.

This Court's holding in *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979), and its dicta in *Lewis v. United States*, 385 U.S. 206 (1966), support the proposition that a right of access does not entail the right to conduct a general search. In *Lo-Ji Sales*, this Court held that although government agents could enter a retail establishment in the same manner as members of the public, entry as customers did not justify a search beyond what a customer "would ordinarily see." *Id.*, 442 U.S. at 329. In *Lewis*, this Court cautioned:

> A government agent, in the same manner as a private person, may accept an invitation to do business and may enter upon the premises for the very purposes contemplated by the occupant. Of course, this does not mean that, whenever entry is obtained by invitation and the locus is characterized as a place of business, an agent is authorized to conduct a general search for incriminating materials.

Id., 385 U.S. at 211. Similarly, in *Mancusi*, Justice White found that a union official might have a reasonable expectation of privacy in his "private desk" even if he could not have such an expectation in an entire "office shared with other officers and employees." *Id.*, 392 U.S. at 377 (White, J., dissenting). "[W]hen [an individual] put[s] something in his filing cabinet [or] in his desk drawer . . . he has the right to know it will be secure from an unreasonable search." *Hoffa*, 385 U.S. at 301.

This Court's rulings concerning third-parties' consent to searches also support the proposition that an employer's limited right of access to an employee's private office does not deprive the employee of all expectation of privacy in the office. In these cases, this Court has held that although a landlord or employer may have a property interest in and limited common authority over premises, the landlord's or employer's consent to search the premises cannot effectively waive the privacy interest of a tenant or employee. In *Chapman*, 365 U.S. 610, this Court rejected the proposition that a landlord could authorize entry into a tenant's apartment. This Court held that the landlord's property interest did not eliminate the tenant's privacy interest in the apartment. *See also Stoner*, 376 U.S. 483 (hotel guest).

In *United States v. Matlock*, 415 U.S. 164 (1974), this Court specified the nature of the "common authority" over premises which must be held by a third-party to render his consent to the search of such premises valid against their occupant. This Court again rejected a "mere property interest" as inadequate:

> The authority which justifies the third-party consent . . . rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the coinhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

Id. at 171 n.7.

An employer does not have the requisite common authority over an employee's private office. In this case, there was no "mutual use." The office was used exclusively by Ortega. Nor was there "joint access or control for most purposes." Access by others was only with Ortega's consent and Ortega controlled his office for all purposes. Based on this Court's precedent, several lower

courts have found employers' consent to the search of their employees' offices inadequate. *See United States v. Blok*, 188 F.2d 1019, 1021 (D.C. Cir. 1951); *United States v. Kahan*, 350 F.Supp. 784, 794-95 (S.D.N.Y. 1972), *aff'd*, 479 F.2d 290 (2d Cir. 1973), *rev'd on other grounds*, 415 U.S. 239 (1974). *Cf. United States v. Gargiso*, 456 F.2d 584, 586-87 (2d Cir. 1972) (employer's consent to search storage area valid when employee did not have exclusive access to area).

In this case, the consenting party and the searching party are merged into one. But this merging of roles does not vest the state with any greater authority than it would have upon consent of a private employer. Despite Petitioners' interest in Ortega's office as his employer, Ortega retained an independent and reasonable expectation of privacy in his office.

This Court's dicta in *Mancusi* is not to the contrary. In that case, this Court held that a union officer had standing to challenge search of a common union office and that the officer had a reasonable expectation of privacy in the office. 392 U.S. at 369-70. In so holding, this Court stated that the officer was "entitled to expect . . . that records would not be taken [from the office] except with his permission or that of his union superiors." *Id.* at 369. In adding the final clause to this sentence, this Court no doubt contemplated union superiors obtaining a commonly used and specific record or set of records from the office. This Court certainly did not contemplate a general and total search of an employee's private office, desk, and file cabinet.

B. *Governmental Needs Cannot Deprive Ortega Of His Reasonable Expectation Of Privacy*

Petitioners argue that society is not prepared to recognize a public employee's expectation of privacy in his or her office because recognition of such an expectation would impair the efficiency of the civil service. This type

of argument has traditionally been allowed no place under this prong of Fourth Amendment analysis. To recognize such an argument here would be to duplicate the analysis which must then be conducted again to determine if the search was "unreasonable." For example, exigent circumstances may render a warrantless search reasonable, *see, e.g., Warden*, 387 U.S. at 298-300 (hot pursuit); *Schmerber v. California*, 384 U.S. 757, 770-71 (1966) (imminent destruction of evidence), but they do not deprive the subject of such a search of his or her reasonable expectation of privacy. Ortega's expectation is in no way unreasonable or illegitimate even if the search was critical to a legitimate governmental purpose.[5]

C. *Ortega's Reasonable Expectation Was That Neither The Police Nor His Employer Or Its Security Force Would Invade His Privacy*

Petitioners also argue that although Ortega may have had a reasonable expectation of privacy vis-a-vis the police, he did not have such an expectation vis-a-vis his superiors and the security force at their direction.[6] This

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[5] As demonstrated *infra* at 19-21, the searches were not necessary to the functioning of the hospital.

[6] Even if material, the distinction between the state as police and the state as employer cannot always be maintained. Many large public employers, like the hospital at issue, have internal security forces. Search and seizure by such internal security forces, and even by the employer itself, often leads to criminal prosecution in addition to administrative action. *See, e.g., United States v. McIntyre*, 582 F.2d 1221 (9th Cir. 1978); *United States v. Sanders*, 568 F.2d 1175 (5th Cir. 1978); *United States v. Bunkers*, 521 F.2d 1217 (9th Cir. 1975); *United States v. Collins*, 349 F.2d 863 (2d Cir. 1965); *United States v. Kahan*, 350 F.Supp. 784 (S.D. N.Y. 1972); *Shaffer v. Field*, 339 F.Supp. 997 (C.D. Cal. 1972); *United States v. Donato*, 269 F.Supp. 921 (E.D. Pa. 1967).

In this case, a "hospital police officer" was the person who conducted the searches. J.A. at 33-34, 40 (O'Connor Deposition at 27, 47); *id.* at 48 (Friday Deposition at 18). Further, Petitioners

argument is also misplaced. Ortega's expectation of privacy extended to all intruders. Because Ortega's expectation was reasonable, no state actor could invade his privacy except in compliance with Fourth Amendment standards.

Petitioners' contentions that public employees cannot legitimately expect to keep job related materials private from their employer and that public employees have no right to maintain purely personal items in their offices are incorrect. A professor may legitimately expect that his unfinished manuscript will not be reviewed by university administrators or colleagues without his permission. A doctor may legitimately expect and indeed has a professional duty to ensure that his patients' confidential files will not be scrutinized by anyone not party to doctor-patient relationship, including hospital administrators. Moreover, society, as well as most public employers, are certainly prepared to recognize that employees may maintain some purely personal items in their offices and, on occasion, use their offices for purely personal purposes such as a telephone call to a spouse. Recognition of such personal use of public space has not transformed government offices into "citadels of inefficiency," but instead made them humane and, indeed, typical worksites.

This Court has never conditioned the protection of the Fourth Amendment on the purposes of a search or the identity of the searchers. In *Camara v. Municipal Court*, 387 U.S. 523 (1967), this Court rejected the proposition that the Fourth Amendment does not protect equally against searches by criminal and civil authorities: "It is surely anomalous to say that the individual and his private property are fully protected by the Fourth

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admit that the search was prompted by "Dr. O'Connor['s] . . . concern[] that a theft of state property may have occurred." Brief of Petitioners at 4. If this concern had proved justified, the fruits of the search would certainly have led to criminal prosecution and, perhaps, conviction.

Amendment only when the individual is suspected of criminal behavior." *Id.* at 530. *See also Donovan*, 452 U.S. at 599; *Michigan v. Tyler*, 436 U.S. 499, 504-05, 506 (1978); *See*, 387 U.S. 541. This Court has recognized that "the Fourth Amendment prohibition against warrantless searches protects against warrantless intrusion during civil as well as criminal investigations . . . . The reason is found in the 'basic purpose of this Amendment . . . [which] is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.'" *Marshall v. Barlow's, Inc.*, 437 U.S. 307, 312 (1978) (quoting *Camara*, 387 U.S. at 528). This Court has found that searches conducted by officials who are "health, fire, or building inspectors" must satisfy the Fourth Amendment even though "[t]heir purpose may be to abate a suspected public nuisance, or simply to perform a routine periodic inspection." *Tyler*, 436 U.S. at 504. The reason underlying these holdings is obvious: "If the government intrudes on a person's property, the privacy interest suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards." *Marshall*, 436 U.S. at 312. The Fourth Amendment is thus not simply a restraint on police action, but "[r]ather, the Court has long spoken of the Fourth Amendment's strictures as restraints imposed upon 'governmental action'—that is, 'upon the activities of sovereign authority.'" *New Jersey v. T.L.O.*, 105 S.Ct. 733, 740 (1985) (quoting *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921)).

D. *Government Offices Should Not Be Categorically Excluded From Fourth Amendment Protection*

Petitioners essentially urge this Court to categorically exclude government offices from the protection of the Fourth Amendment by finding that public employees cannot under any circumstances have a reasonable expectation of privacy in their offices. To adopt this sug-

gestion would be to adopt the form of analysis rejected in *Katz*. This Court held in *Katz* that there are no constitutionally protected or constitutionally unprotected areas, "For the Fourth Amendment protects people, not places." *Id.*, 389 U.S. at 351. "[W]hat [an individual] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id.* at 351-52.

Since *Katz*, this Court has been extraordinarily reluctant to find any area outside the bounds of the Fourth Amendment. This Court has advised "caution in approaching claims that the Fourth Amendment is inapplicable in a given context." *Hudson v. Palmer*, 104 S.Ct. 3194, 3200 (1984). In fact, since *Katz*, this Court has found only one area to be so unprotected—prison cells. *Hudson*, 104 S.Ct. at 3200. Adoption of Petitioners' position would equate the office of a public servant with the cell of a convicted criminal. No amount of evidence of the administrative convenience served by such searches could justify this result. Last term in *T.L.O.*, 105 S.Ct. 733, this Court held:

> Although this Court may take notice of the difficulty of maintaining discipline in the public schools today, the situation is not so dire that students in the schools may claim no legitimate expectations of privacy. We have recently recognized that the need to maintain order in a prison is such that prisoners retain no legitimate expectations of privacy in their cells, but it goes almost without saying that "[t]he prisoner and the schoolchild stand in wholly different circumstances, separated by the harsh facts of criminal conviction and incarceration." *Ingraham v. Wright*, 430 U.S., at 669. . . . We are not yet ready to hold that the schools and the prisons need be equated for purposes of the Fourth Amendment.

Id. at 742.

This Court should likewise refuse to equate government offices with prison cells. In fact, this Court in *Hudson*

expressly stated that "[a] prison 'shares none of the attributes of privacy of . . . an office.'" *Id.* at 3201 (quoting *Lanza v. New York*, 370 U.S. 139, 143-44 (1962)).

Ortega displayed a subjective expectation of privacy in his office and this expectation is one that society is prepared to recognize as reasonable.

II. The Searches Of Ortega's Office Were Unreasonable

The Fourth Amendment prohibits only unreasonable searches and seizures. The searches of Ortega's office were unreasonable.

A. The Searches Were Per Se Unreasonable Because They Were Conducted Without A Warrant

This Court has long held that warrantless searches are *per se* unreasonable. This rule has most often been applied to searches of homes, but it has also been applied "in a variety of other settings," *Chadwick*, 433 U.S. at 10, including offices. *See Marshall*, 436 U.S. at 312; *G.M. Leasing*, 429 U.S. at 355; *Mancusi*, 392 U.S. at 370-71; *Berger*, 388 U.S. at 54-64; *Camara*, 387 U.S. at 543. This rule applies to all cases not falling into "a few specifically delineated and well- recognized exceptions." *T.L.O.*, 105 S.Ct. at 750-51 (Brennan, J., dissenting). *See also United States v. Ross*, 456 U.S. 798, 825 (1982); *Mincey v. Arizona*, 437 U.S. 385, 390 (1978); *Katz*, 389 U.S. at 357. This case does not fall into any of the exceptions to the warrant requirement.

Petitioners argue that a warrant should not be required in this context because such a requirement would impair the efficiency of the civil service. In assessing this claim, it should be noted that the party seeking an exemption from the warrant requirement bears the burden "to show the need for it." *Arkansas v. Sanders*, 442 U.S. 753, 760 (1979) (quoting *United States v. Jeffers*, 342 U.S. 48, 51 (1951)). *See also Chimel v. California*, 395 U.S. 752, 762 (1969); *Katz*, 389 U.S. at 357.

Petitioners' argument is fundamentally misconceived. In *Camara*, this Court firmly rejected an identical argument:

> The final justification suggested for warrantless administrative searches is that the public interest demands such a rule. . . . [W]e think this argument misses the mark. The question is not, at this stage at least, whether these inspections may be made, but whether they may be made without a warrant. . . . In assessing whether the public interest demands creation of a general exception to the Fourth Amendment's warrant requirement, the question is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant, which in turn depends in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search. . . . It has nowhere been urged that fire, health, and housing code inspection programs could not achieve their goals within the confines of a reasonable search warrant requirement. Thus, we do not find the public need argument dispositive.

387 U.S. at 533.

Petiitoners presented no evidence suggesting that under the particular facts of this case they could not have obtained a warrant for the searches of Ortega's office. "[S]pecial governmental needs sufficient to overcome the warrant requirement flow from exigency—that is, press of time that makes obtaining a warrant either impossible or hopelessly infeasible." *T.L.O.*, 105 S.Ct. at 751 (Brennan, J., dissenting). *See also United States v. Place*, 462 U.S. 696, 701-02 (1983); *Mincey*, 437 U.S. at 393-94 (1978); *Johnson v. United States*, 333 U.S. 10, 15 (1984).

No exigency of any kind existed in this case. Ortega had been excluded from the office. All government prop-

erty was thus secure within the office. After the property was thus "safely immobilized, it was unreasonable to undertake the additional and greater intrusion of a search without a warrant." *Chadwick*, 433 U.S. at 13. There was no urgent need to secure any of the property in the office. The searches were conducted piecemeal over a period of more than a week. III Record Tab 30, Stratton Deposition at 52-53. Moreover, Petitioners admit that *all* the property removed from the office was simply "boxed" and placed in storage for Ortega to retrieve. Brief for Petitioners at 8 n.5.

At worst, a warrant requirement would have caused Petitioners minor inconvenience. Such inconvenience cannot outweigh Ortega's constitutional right. Such a result would subvert "the purpose of a written Constitution and its Bill of Rights."

> That purpose, of course, is to ensure that certain principles will not be sacrificed to expediency; these are enshrined as principles of fundamental law beyond the reach of governmental officials or legislative majorities. The Fourth Amendment is part of that fundamental law; it represents a value judgment that unjustified search and seizure so greatly threatens individual liberty that it must be forever condemned as a matter of constitutional principle.

Hudson, 104 S. Ct. at 3216 (Stevens, J., concurring in part and dissenting in part) (footnote omitted). In applying the Fourteenth Amendment's due process clause to a public employer, this Court held:

> Certainly, the boards have an interest in devising prompt and efficient procedures to achieve their legitimate objectives. . . . But, as the Court stated in *Stanley v. Illinois*, [405 U.S. 645], 656 [1972]:
>
> > "[T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general . . . that they were designed to protect the fragile

> values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praisewo[illegible] government officials no less, and perhaps [illegible]e, than mediocre ones." (Footnote omitted.)

> While [one procedure] might be easier for the school boards . . ., administrative convenience alone is insufficient to make valid what otherwise is a violation of due process of law. The Fourteenth Amendment requires the school boards, to employ alternative administrative means, which do not so broadly infringe upon basic constitutional liberty, in support of their legitimate goals.

Cleveland Board of Education v. LaFleur, 414 U.S. 632, 646-47 (1974) (footnotes omitted).

Petitioners argue that a public employer must enjoy all the power and authority over its employees enjoyed by a private employer: "Where the government employer does not act in aid of a pending criminal proceeding, it must have the same right to oversee its employees and investigate job performance as any private employer would have." Brief for Petitioners at 13. But Petitioners' argument overlooks the impediment of the Constitution. The Constitution does not limit the actions of private employers, but it does limit the actions of public employers. A private employer can fire an employee in retaliation against the employee's exercise of his right to speak or associate, a public employer cannot. *Connick v. Myers*, 461 U.S. 138 (1983); *Givhan v. Western Line Consolidated Schools*, 439 U.S. 410 (1974); *Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1977); *Pickering v. Board of Education*, 391 U.S. 563 (1968). A private employer can fire an employee without affording him any type of hearing, a public employer cannot. *Cleveland Board of Education v. Loudermill*, 105 S.Ct. 1487 (1985); *Board of Regents v. Roth*, 408 U.S. 564 (1972). Likewise, a private employer can search an employee's

office, but a public employer cannot.[7] In each of these areas, this Court has held "that the state and federal governments, even in the exercise of their internal operations, do not constitutionally have the complete freedom of action enjoyed by a private employer." *Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v. McElroy*, 367 U.S. 886, 897-98 (1961).

Petitioners assert that the authority to search an employee's office for any reason and at any time is critical to their role as employer. But requiring that state officials obtain a warrant prior to a search of the type at issue would not unduly hamper public administration. Contrary to Petitioners' assertions, these searches were not part of the normal, everyday administration of the hospital. The issue here is not whether the boss or a fellow employee can scan an office in search of a lost file or borrow a paper clip. The searches at issue were both extraordinarily intrusive and not a normal part of the operation of the hospital. In the normal administration of an office, the boss or a fellow employee would not enter another employee's private office without requesting and receiving consent. A warrant requirement would not restrict these interactions because in almost all instances the employee, like the businessman in *Marshall*, "can be expected in normal course to consent to inspection without warrant." *Id.*, 436 U.S. at 316. In this case, there is no evidence in the record suggesting that Ortega would not have consented to produce whatever Petitioners wished to inspect. In fact, Petitioner Friday admitted that there was no reason why Ortega was not permitted

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[7] The Fourth Amendment limits the means by which the government, in contrast to a private actor, can carry out other non-police functions as well. *Compare Ex Parte Jackson*, 96 U.S. 727 (1877) (Post Office Department cannot open mail without warrant to enforce postal regulations) *with Walter v. United States*, 447 U.S. 649, 656 (1980) (private carrier can open packages without violating Fourth Amendment).

to be present during the searches. Record Expando File, Friday Deposition at 37.

The searches at issue here were not a part of the normal operation of the hospital. Rather they were part of an extraordinary investigation of Ortega. A special committee which included a member of the hospital's police force was appointed to conduct this investigation. The investigation was not a routine review, but instead related to extraordinary charges against Ortega which resulted in Ortega's removal from his position and might have resulted in criminal charges against Ortega.

Finally, the routine types of intrusions into an employee's private office cited by Petitioners cannot be compared to the extraordinary intrusions at issue here. The scope of the searches distinguishes them from the normal intrusions which form a necessary part of the collective enterprise of operating a public hospital. The sanitized language used by Petitioners to describe the searches—labeling them an "inventory," Brief for Petitioners at 8 n.5—cannot disguise their extreme intrusiveness. Petitioners entered Ortega's locked office in his absence and literally inspected every item in that office, including those contained in his desk and file cabinet.[8] A member

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[8] In contrast is the procedure followed in *Chocallo*, 548 F.Supp. 1349. In that case, a hearing officer refused to release a file after an appellate body reversed her decision and directed that the case be transferred. As a result:

> According to Ennis, he obtained the key to the office from Kuriger, the Regional Chief ALJ's secretary, who kept office keys, then unlocked and opened the door in the presence of the above named witnesses. Ennis gave Kuriger *instructions to enter the office and to make a visual inspection* of plaintiff's desk and table for the Taylor file, *but not to open any drawers or file cabinets.* While the witnesses remained outside the open door and observed, Kuriger entered and made a visual inspection. According to Ennis, she followed these directions to the letter, *spending two or three minutes looking* but not locating the file, and *then exiting the office without touching, disturbing,*

of the hospital's police force spent several hours in Ortega's office on more than seven days. III Record Tab 30, Stratton Deposition at 52-53. Protecting public employees from such extraordinarily intrusive searches will not unduly impair the efficiency of public administration.

Petitioners, like so many public employers charged with violating the Constitution, cite to this Court its words in *Bishop v. Wood*, 426 U.S. 341 (1976), "the federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies." *Id.* at 349. But the Court of Appeals' holding in no way suggests or mandates such a result. The extraordinary searches at issue were not among the "multitude of personnel decisions" that the federal courts might justifiably decline to scrutinize. The extraordinary nature and extreme intrusiveness of the searches places this case squarely within the protection of the Fourth Amendment. And "the federal courts are the appropriate forum for ensuring that the constitutional mandates . . . are followed by those agencies of government making personnel decisions that pervasively influence the lives of those affected thereby." *Id.* at 354 (Brennan, J., dissenting).

B. *The Searches Violated All Standards Of Reasonableness Yet Established Under The Fourth Amendment*

Even if the warrant requirement did not apply in this context, the searches at issue violated all standards of reasonableness yet established under the Fourth Amendment. "[A] warrantless search must be strictly circumscribed by the exigencies which justify its initiation." *Mincey*, 437 U.S. at 393 (quoting *Terry*, 392 U.S. at 25-26)). The only exigency which even arguably justified

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or removing any item from the office. Ennis then closed and locked the door in the presence of the same witnesses.

Id. at 1363 (emphasis added).

these searches was a belief that Ortega had removed a computer believed to be hospital property from his office.[9] This belief could have been verified through visual inspection of the interior of the office. But the scope of the searches—including inspection of all items in the office, desk, and file cabinet—far exceeded this limited intrusion. *See Mincey*, 437 U.S. at 393. The searches "as actually conducted" were thus not "reasonably related in scope to the circumstances which justified the interference in the first place." *T.L.O.*, 105 S.Ct. at 744 (quoting *Terry*, 392 U.S. at 20).

The only articulated rationale for the searches was a need to separate State property from Ortega's personal property. J.A. at 64 (Stratton Deposition at 41); *id.* at 50 (Friday Deposition at 21). Even if there had been some urgent need to obtain specific State property or even all State property believed to be in Ortega's office,[10] the scope of the searches was not justified by any such need. In *Davis*, 328 U.S. 582, this Court stated:

> We do not suggest that officers seeking to reclaim government property may proceed lawlessly subject

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[9] The record reveals, however, that the computer was ordinarily located outside Ortega's office in an open office, that Ortega routinely brought the computer home on weekends, that Ortega notified the hospital the day after he brought the computer home that he had done so, and that the search was not authorized or conducted until after Ortega had so informed his secretary. II Record Tab 27, Ortega Declaration ¶¶ 9, 10, Exhibit I. Petitioners O'Connor and Friday both admitted that concern about the computer did not motivate the searches. J.A. a 39 (O'Connor Deposition at 44); Record Expando File, Friday Deposition at 44-45. O'Connor testified that he became aware that the computer was missing when Ortega called his secretary and informed her that he had the computer at his home. J.A. at 36 (O'Connor Deposition at 34).

[10] The record reveals that the principal public records utilized by Ortega as Chief of Professional Education—residents' files—were stored not in Ortega's office, but outside his office in his secretary's office. J.A. at 14 (Ortega Declaration ¶ 5); *id.* at 21 (Ciraulo Declaration ¶ 5).

> to no restraints, nor do we suggest that the right to inspect [for government property] subjects a dealer to a general search of his papers for the purpose of learning whether he has any government property subject to inspection or seizure.

Id. at 591.

The hospital police officer who conducted the searches acknowledged that after less than one hour in the office, he realized he was unable to separate state property from personal property. III Record Tab 30, Stratton Deposition at 7-8, 51. No State property of any kind was segregated or utilized in any manner. The searches continued, however, for several hours on each of more than seven days. *Id.* at 53. Petitioners continued to search Ortega's office, reviewing all items in the office, despite the fact that they had abandoned their original stated objective of securing State property.

C. *The Standard Proposed By Petitioners Would Wholly Deprive Public Employees Of Fourth Amendment Protection*

The standard proposed by Petitioners would wholly eviscerate the protection of the Fourth Amendment. Petitioners suggest that the search of a public employee's office "be deemed reasonable if conducted for work-related concerns." Brief for Petitioners at 24. This standard would allow public employers to invade the privacy of their employees *to any degree* so long as the invasion was somehow related to the employer's function. For example, this standard would countenance a university administration's routine or selective search of professors' offices to determine how much research they had conducted. Petitioners' suggestion would allow the states to seek their ends by any means. The protections of the Bill of Rights were adopted precisely to avoid such a result.

Such a derogation of the protections of the Fourth Amendment is not justified in the context of public em-

ployment. In *T.L.O.*, 105 S.Ct. 773, this Court took notice of the "disorder" in public schools, involving "drug use and violent crime." *Id.* at 742. This Court also found that the preservation of order in schools "requires close supervision of school children" and "swift and informal . . . procedures." *Id.* at 742, 743. These findings led this Court to conclude "that the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject." *Id.* at 743. These factors do not exist in this case nor justify a similar easing of restrictions in the setting of public employment.

Responsible public officials—doctors, lawyers, professors, policemen, and judges—are not schoolchildren. They do not require "close supervision." Civil servants must exercise discretion and act autonomously and these functions require privacy. Civil service laws exist in every state precisely to prevent "swift and informal . . . procedures." The independence of public employees is critical to their faithful performance of their duties as well as to the attraction of qualified candidates into the civil service. The protections of the Fourth Amendment complement the goals of civil service reform and promote the efficiency and independence of public servants. This Court should not allow the states to defeat these objectives by infringing the Fourth Amendment freedoms of their employees.

CONCLUSION

For all the above-stated reasons, the American Federation of State, County and Municipal Employees, AFL-CIO respectfully requests that this Court affirm the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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DENNIS M. O'CONNOR, ET AL.,
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v.

MAGNO J. ORTEGA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AND THE NATIONAL EDUCATION ASSOCIATION AS AMICI CURIAE SUPPORTING RESPONDENT

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
Introduction	4
I. The General Search And Seizure Conducted In This Case Was Unreasonable	5
II. The Fourth Amendment Prohibits Government Employers From Unreasonably Searching And Seizing The Personal Papers And Effects Of Government Employees	10
CONCLUSION	20

TABLE OF AUTHORITIES

CASES: Page

Arnett v. *Kennedy*, 416 U.S. 134 (1974) 12
Board of Regents v. *Roth*, 408 U.S. 564 (1972) 11
Bush v. *Lucas*, 462 U.S. 367 (1983) 12
Camara v. *Municipal Court*, 387 U.S. 523 (1967) .. 6, 19
Chenkin v. *Bellevue Hospital Center, New York City Health & Hospitals Corp.*, 479 F. Supp. 207 (S.D.N.Y. 1979) 15, 18
Chimel v. *California*, 395 U.S. 752 (1969) 6
Colonnade Catering Corp. v. *United States*, 397 U.S. 72 (1970) 13, 14, 16
Connick v. *Myers*, 461 U.S. 138 (1983) 7
G. M. Leasing Corp. v. *United States*, 429 U.S. 338 (1977) 16
Gardner v. *Broderick*, 392 U.S. 273 (1968) 11
Gillard v. *Schmidt*, 579 F.2d 825 (3d Cir. 1978) 18
Ker v. *California*, 374 U.S. 23 (1963) 6
Kingsley International Pictures Corp. v. *Regents of the University of the State of New York*, 360 U.S. 684 (1959) 7
Lo-Ji Sales, Inc. v. *New York*, 442 U.S. 319 (1979) 3, 10
Madison School District v. *Wisconsin Employment Relations Commission*, 429 U.S. 167 (1976) 7
Mancusi v. *DeForte*, 392 U.S. 364 (1968) 5, 9
Marshall v. *Barlow's Inc.*, 436 U.S. 307 (1978) 14, 15, 16
New Jersey v. *T.L.O.*, —— U.S. ——, 105 S. Ct. 733 (1985) ..... *passim*
Perry v. *Sindermann*, 408 U.S. 593 (1972) 3, 10, 11, 12
Pickering v. *Board of Education*, 391 U.S. 563 (1968) 10, 11, 12
Schneckloth v. *Bustamonte*, 412 U.S. 218 (1973) 6
Shelton v. *Tucker*, 364 U.S. 479 (1960) 11
Torcaso v. *Watkins*, 367 U.S. 488 (1961) 11
Uniformed Sanitation Men Association, Inc. v. *Commissioner of Sanitation*, 392 U.S. 280 (1968) 3, 11
United States v. *Biswell*, 406 U.S. 311 (1972) 13, 16

TABLE OF AUTHORITIES—Continued

Page

United States v. *Blok*, 188 F.2d 1019 (D.C. Cir. 1951) 18
United States v. *Bunkers*, 521 F.2d 1217 (9th Cir.), *cert. denied*, 423 U.S. 989 (1975) 15
United States v. *Collins*, 349 F.2d 863 (2d Cir. 1965), *cert. denied*, 383 U.S. 960 (1966) 15
United States v. *Speights*, 557 F.2d 362 (3d Cir. 1977) 15, 18
United States v. *United States District Court*, 407 U.S. 297 (1972) 3, 6, 17
Wyman v. *James*, 400 U.S. 309 (1971) 13

UNITED STATES CONSTITUTION:

Amendment I 3, 7, 11
Amendment IV ..... *passim*
Amendment V 3
Amendment XIV 12

STATUTES:

42 U.S.C. § 1983 13

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BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AND THE NATIONAL EDUCATION ASSOCIATION AS AMICI CURIAE SUPPORTING RESPONDENT

INTEREST OF AMICI CURIAE

The American Civil Liberties Union is a nationwide, nonpartisan organization of more than 250,000 persons, dedicated to preserving and protecting the civil rights and civil liberties guaranteed by the Constitution.

The National Education Association ("NEA") is a nationwide employee organization, with a current membership of over 1.8 million. The vast majority of NEA's members are educators in public schools, colleges, and universities.

The primary issue in this case—whether and to what extent the Fourth Amendment protects public employees

from warrantless searches by their employers—directly implicates the rights of all NEA members, and will have a great impact on the rights of public employees throughout the country.

With the consent of the parties, we file this brief *amici curiae* in the belief that it will assist the Court in its deliberations.

SUMMARY OF ARGUMENT

I. The general search and seizure conducted in this case was unreasonable under the standards recently declared in *New Jersey* v. *T.L.O.*, —— U.S. ——, 105 S. Ct. 733, 744 (1985).

First, Petitioners' action was unjustified at its inception. Petitioners' own description shows that they were engaged in an investigatory search, rather than a mere "inventory" as they would characterize it. Such a search is unreasonable unless authorized by a valid search warrant, except in certain carefully defined classes of cases, none of which is applicable here. Even if no warrant were required, the search was constitutionally defective because it was unreasonable "under all the circumstances." *T.L.O.*, 105 S. Ct. at 743. Petitioners should have sought to obtain these materials from Respondent rather than compelling his absence and then entering and searching his locked office and seizing the materials therein.

Second, even if Petitioners' search had been justified at the inception, it still would have been unreasonable in scope. The "measures adopted" by Petitioners were not "reasonably related to the objectives of the search and not excessively intrusive" as *T.L.O.* requires. *Id.* at 744. It is basic Fourth Amendment law that a justified entry to search for a particular item or items does not permit a wholesale search and seizure of other property such as

occurred here. *See, e.g., Lo-Ji Sales, Inc.* v. *New York*, 442 U.S. 319, 325-28 (1979).

II. Petitioners, joined in large part by the United States, propose an extremely restrictive view of the Fourth Amendment rights of public employees. Their respective positions are without merit.

It is by now well settled that the Constitution protects public employees in their relations with their government employer. *See, e.g., Perry* v. *Sindermann*, 408 U.S. 593, 597, 599 (1972) (Fourteenth Amendment right not to be deprived of property without due process of law); *Uniformed Sanitation Men Association* v. *Commissioner of Sanitation*, 392 U.S. 280, 284-85 (Fifth Amendment privilege against self-incrimination). Employee Fourth Amendment rights stand on no lesser footing. *Cf. T.L.O., supra*, rejecting the contention that public school students have no Fourth Amendment right of privacy while at school.

Petitioners assert that "a public employee's right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with the need of agency officials and supervisors to have access to the offices of public employees, and their contents, to monitor performance, administratively investigate work-related conduct, or merely to retrieve government records." (Pet. Br. at 16). This position is entirely mistaken in principle. Individual expectations of privacy are not unreasonable for purposes of the Fourth Amendment simply because the government has a need to make an unfettered search. *E.g., United States* v. *U. S. District Court*, 407 U.S. 297, 312 (1972); *T.L.O., supra*, 105 S. Ct. at 742-43. Moreover, the claim that an unfettered right to enter and search employees' offices is administratively necessary is wholly unsupported and, as the record in this case illustrates, is unsupportable.

ARGUMENT

Introduction

While Petitioners and the United States stop short of asserting, in so many words, that a public employee is wholly unprotected by the Fourth Amendment against entry into and searches of his office, both take an exceedingly narrow view of the Fourth Amendment protections. Petitioners contend that "[a] public employee's right of privacy in traditional Fourth Amendment terms is *fundamentally incompatible* with the need of agency officials and supervisors to have access to the offices of public employees, *and their contents* * * *." (Pet. Br. at 16; emphasis added.)[1] The United States, in turn, asserts that "a government employee has no reasonable expectation that a supervisor or co-employee *will not enter his office* in the course of performing employment-related duties." (U.S. Br. at 8; upper case omitted, emphasis added.)

On the latter issue, both briefs rely heavily on this Court's recent decision in *New Jersey* v. *T.L.O.*, —— U.S. —— 105 S. Ct. 733 (1985). (Pet. Br. at 22-25; U.S. Br. at 15-17.) We agree that *T.L.O.* provides the appropriate framework for analysis of the reasonableness of the search in this case; but, as we show in Part I of our brief, under the standards there reaffirmed, the search of Respondent's office was clearly unreasonable and violated the Fourth Amendment. In Part II of the brief, we show that *T.L.O.*'s principal holding—which rejected the State's contention that a student has no reasonable expectation of privacy in a public school setting—requires rejection likewise of the respective views of the Petitioners and the United States with respect to the reasonableness of a public employee's expectation of privacy in his office and the contents thereof.

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[1] Brief for Petitioners is referred to throughout as "Pet. Br." Brief for the United States as Amicus Curiae in Support of Petitioners is referred to throughout as "U.S. Br."

I. The General Search And Seizure Conducted In This Case Was Unreasonable

This Court reaffirmed in *New Jersey* v. *T.L.O.* that:

> [d]etermining the reasonableness of *any* search involves a twofold inquiry: first, one must consider "whether the * * * action was justified at its inception," *Terry* v. *Ohio*, 392 U.S., at 20, 88 S. Ct. at 1879; second, one must determine whether the search as actually conducted "was reasonably related in scope to the circumstances which justified the interference in the first place," *ibid.* 105 S. Ct. at 744 (emphasis added).

Although both Petitioners and the United States seek to justify the search and seizure in this case largely as a routine "inventory" search, neither can escape the fact that the search occurred in connection with the hospital's pending investigation into sexual harassment and other charges against Respondent. Petitioners concede that the search and seizure was directed by the "investigative team" looking into those charges (Pet. Br. at 4), and the United States admits that the search was "in furtherance of the administrative investigation and in light of the incident with the computer" (U.S. Br. at 3; *see also id.* at 7 (the purpose of the search was "to locate state property in connection with an administrative investigation into [Respondent's] malfeasance on the job")). Whatever the proffered justification, the search was unreasonable both (a) at its inception and (b) as actually conducted.

A. To the extent the purpose of the search was investigative, the search was unjustified at its inception because a warrant was required. "[I]t is settled for purposes of the [Fourth] Amendment that 'except in certain carefully defined classes of cases, a search of private property without proper consent is "unreasonable" unless it has been authorized by a valid search warrant.'" *Mancusi* v. *DeForte*, 392 U.S. 364, 370 (1968), *quoting*

Camara v. *Municipal Court*, 387 U.S. 523, 528-29 (1967). The few exceptions to the warrant requirement are narrow and arise in circumstances not present here. *See Chimel* v. *California*, 395 U.S. 752, 762-63 (1969) (search incident to arrest); *Ker* v. *California*, 374 U.S. 23 (1963) (exigent circumstances); *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973) (valid consent). *See also* pp. 13-16, *infra*.

Administrative searches in connection with investigations may not be conducted without a warrant except where the government can show that "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search." *Camara* v. *Municipal Court*, 387 U.S. 523, 533 (1967). The Court held in *T.L.O.* that the warrant requirement is unsuited to dealing with students in the public school environment because the delay involved "would unduly interfere with the maintenance of the swift and informal disciplinary proceedings needed in the schools." 105 S. Ct. at 743. In this case, however, Petitioners have made no showing that obtaining a warrant would have jeopardized the effectiveness of their investigative search. Nor could they. Having banned Respondent from the hospital grounds and forbidden him from returning without their prior written approval,[2] Petitioners had ample time to secure a warrant—which, if not necessary for the initial entry into the office, plainly would have been required for an investigative search and seizure of Respondent's personal possessions. Since even the "special circumstances applicable to domestic security surveillances" do not justify an exception to the warrant requirement, *United States* v. *United States District Court*, 407 U.S. 297, 318-21 (1972), surely the search by the hospital security guard and other officials in this case merits no exception either.

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[2] 764 F.2d at 704. We rely generally in this brief upon the facts set forth in the Brief For Amicus Curiae Appointed By The Court In Support Of Respondent, and do not burden the Court with another iteration of them.

Petitioners' argument that no warrant was needed depends ultimately upon their *ipse dixit* that the search here was merely an "inventory." Petitioners claim to use the term solely "[f]or purposes of consistency and simplicity" (Pet. Br. at 8 n.5), but they frame both their question presented and entire argument around the conclusion that the search was only an "inventory." As Chief Justice Burger stated in an analogous situation, "[t]his cryptic conclusion seems to ignore the ancient wisdom that calling a thing by a name does not make it so." *Madison School District* v. *Wisconsin Employment Relations Commission*, 429 U.S. 167, 174 (1976). In view of the investigative character of the search and Petitioners' notable failure to present facts that would support the conclusion that obtaining a warrant would have been unduly burdensome, Petitioners have failed to overcome the constitutional preference for a warrant.

The outcome in this case would be the same, however, if no warrant were required. Even if the search here were properly characterized as an "inventory" search, and even if it were analyzed under the relatively loose Fourth Amendment balancing test applied by the Court in *T.L.O.* to the special circumstances of the search of a public school student's property, the search would still be constitutionally defective because unreasonable "under all the circumstances." *T.L.O.*, 105 S. Ct. at 743. Petitioners conjure up images—having nothing to do with the actual record of this case—of public employees' interdicting one another from entering their respective "allocated office space[s]" (U.S. Br. at 8) to obtain a file or a book (Pet. Br. at 16; U.S. Br. at 11). While there may be difficult public employee Fourth Amendment cases in the future—just as there are difficult public employee First Amendment cases, *see, e.g.*, *Connick* v. *Myers*, 461 U.S. 138 (1983)—Petitioners' conduct "cuts so close to the core of constitutional freedom as to make it quite needless in this case to examine the periphery," *Kingsley International Pictures Corp.* v. *Regents of the University of the State of New York*, 360 U.S. 684, 689 (1959).

Dr. Ortega's hospital office was a professional office. It displayed his name on the door. It contained the confidential files of his psychiatric patients, as well as his own personal and professional papers and effects. It was secured by a locked door. And during the 17 years he occupied the office, no one previously had entered it without his permission. Given Respondent's obviously legitimate expectation of privacy in his office, and even accepting at face value Petitioners' representation that their search of Dr. Ortega's office was "no more than an attempt to sort government property from respondent's" (Pet. Br. at 25), Petitioners at a minimum should have contacted Dr. Ortega in advance to ask his permission to enter the office, to try to arrive at a compromise solution, to seek his assistance in identifying hospital property, or to elicit information from him that would have made a search unnecessary.

The course Petitioners pursued was not reasonably calculated to achieve their stated objective of identifying state property. Petitioners made certain that Dr. Ortega was absent when they entered his office (*see, e.g.*, U.S. Br. at 2), yet, without his assistance, their subsequent attempt to determine whether his patient files and other property were state or personal proved "impossible." (Pet. Br. at 8 n.5.) Had Petitioners contacted Dr. Ortega, they would have discovered that the computer Dr. Ortega was rumored to have stolen was not state property, 764 F.2d at 704, and in fact still remained on hospital grounds (in the office *adjoining* his). *Id.* They also apparently would have learned that the only state property contained in Dr. Ortega's office was his office furniture, and that he maintained his hospital records separately in two file cabinets outside his office door. *Id.*[3] In sum, they would have learned that no search of

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[3] The United States criticizes the Court of Appeals for accepting Respondent's declaration of this fact (U.S. Br. at 9), but Petitioners do not dispute it.

Dr. Ortega's office was necessary, certainly not a search without his being present.[4]

B. Even if Petitioners' search had been justified at its inception, it still would have been unreasonable in scope. At a minimum, "the measures adopted" in such a search must be "reasonably related to the objectives of the search and not excessively intrusive * * *." *T.L.O.*, 105 S. Ct. at 744. The general search and seizure conducted by Petitioners was neither.

First, it far exceeded any legitimate state interest in an "inventory" search. As the Court of Appeals observed: "Office inventories were apparently reserved for employees who were departing or terminated. When Ortega's office was searched, he was neither scheduled to depart nor had he been terminated." 764 F.2d at 705-06. And Petitioners' erroneous suspicion that Dr. Ortega had stolen a computer did not justify their sweeping search and seizure of all of his files and personal belongings. It is basic Fourth Amendment law that a justified entry to search for a particular item or items does not permit a wholesale search and seizure of other property such as

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[4] The United States' extraction of dicta from *Mancusi* v. *DeForte*, 392 U.S. 364 (1968), to justify the search is unavailing. (*See* U.S. Br. at 8-9.) This Court held in *Mancusi* that an employee had standing to object to the search and seizure by government officials of business papers in the employee's custody. The Court observed that the employee, a union official, was entitled to expect that the papers would not be seized without "his permission or that of his union superiors." 392 U.S. at 369. The United States cites the Court's use of the words, "or that of his union superiors," to mean that an employer has the right to search his employee's papers. (U.S. Br. at 8-9.) This is not so. Unlike the papers and effects seized here, the papers in *Mancusi* belonged to the *employer*, not to the employee. 392 U.S. at 367. This Court's dicta merely reflected the obvious truth that the employer had the right to give its own papers to the government. If anything, *Mancusi* supports affirmance in this case, for the Court found that employees have legitimate expectations of privacy even in papers that they do not own but merely maintain in *non*-private office areas.

occurred here. *See, e.g., Lo-Ji Sales, Inc.* v. *New York*, 442 U.S. 319, 325-28 (1979).

For the same reason, the search also was unnecessarily intrusive as an investigative search. The search was unlimited, unparticularized, and "reminiscent of the general warrant or writ of assistance of the 18th century against which the Fourth Amendment was intended to protect." 442 U.S. at 325.

Contrary to assertions made both by Petitioners and by the United States as *amicus curiae*, this case does not concern some nebulous right of a public employee to be secure in his "allocated office space." (U.S. Br. at 8; Pet. Br. at 16.) Rather, this case turns upon the Fourth Amendment's explicit protection of a person's "papers and effects"—specifically, Respondent's personal correspondence, the confidential medical files of his private, non-hospital patients, his appointment books and notes, family photographs, and other personal documents and materials maintained in his locked hospital office. The general, unconsented search and seizure of these papers and effects from Respondent's locked hospital office was unreasonable under any of the arguably applicable Fourth Amendment standards.

II. The Fourth Amendment Prohibits Government Employers From Unreasonably Searching And Seizing The Personal Papers And Effects Of Government Employees

A. Petitioners grudgingly acknowledge that "a public employee does not relinquish constitutional rights by virtue of public employment." (Pet. Br. at 10, *citing Pickering* v. *Board of Education*, 391 U.S. 563 (1968).) (*See also* U.S. Br. at 12.) This acknowledgment is entirely justified.

In *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972), the Court summarized what, at that time, was already well-established principle:

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." *Speiser* v. *Randall*, 357 U.S. 513, 526. Such interference with constitutional rights is impermissible.

Justice Stewart added, "[m]ost often, we have applied the principle to denials of public employment." *Id.* Among the dozen cases cited for that proposition were those involving the First Amendment right of freedom of religion,[5] freedom of speech,[6] and freedom of association.[7] The Court also held in *Perry* and its companion case, *Board of Regents* v. *Roth*, 408 U.S. 564 (1972), that a public employee enjoys the Fourteenth Amendment right not to be deprived of property without due process of law. So too, "public employees are entitled, like all other persons, to * * * the privilege against self-incrimination." *Uniformed Sanitation Men Association, Inc.* v. *Commissioner of Sanitation*, 392 U.S. 280, 284-85 (1968); *see also Gardner* v. *Broderick*, 392 U.S. 273 (1968). Employee Fourth Amendment rights stand on no lesser footing.

Moreover, "petitioners recognize * * * that Fourth Amendment strictures apply to state officials, whether

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[5] *E.g., Torcaso* v. *Watkins*, 367 U.S. 488 (1961).

[6] *E.g., Pickering* v. *Board of Education*, 391 U.S. 563 (1968).

[7] *E.g., Shelton* v. *Tucker*, 364 U.S. 479 (1960).

criminal or civil, in safeguarding reasonable privacy interests against arbitrary governmental invasion." (Pet. Br. at 9, *citing New Jersey* v. *T.L.O.*, —— U.S. ——, 105 S. Ct. 733 (1985).) In *T.L.O.*, this Court rejected the State's contention "that the history of the Fourth Amendment indicates that the Amendment was intended to regulate only searches and seizures carried out by law enforcement officers; accordingly, although public school officials are concededly state agents for purposes of the Fourteenth Amendment, the Fourth Amendment creates no rights enforceable against them." 105 S. Ct. at 740.

Notwithstanding the foregoing, Petitioners contend "that the Fourth Amendment does not apply to an entry into and inventory of a public employee's government-assigned office by agency administrators in the context of supervision or administrative investigation into work-related conduct." (Pet. Br. at 14.) In so arguing, Petitioners rely on three lines of cases, which we shall discuss seriatim.

1) The first of these relates to the authority of government to control and discipline its employees. (*See* Pet. Br. at 10-12.) That authority is simply not at issue in this case; even if it were, the decisions of this Court, such as *Pickering* and *Sindermann*—as well as Justice Powell's opinion in *Arnett* v. *Kennedy*, 416 U.S. 134, 164-67 (1974), which Petitioners cite (Br. at 10)—establish that the exercise of that authority is subject to constitutional constraints.[8]

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[8] This is recognized by *Bush* v. *Lucas*, 462 U.S. 367 (1983), which Petitioners quote at length. *Bush* holds that the "elaborate remedial system that has been constructed step by step with careful attention to conflicting policy considerations" under the federal service laws is not to be "augmented by the creation of *a new judicial remedy for the constitutional violation at issue.*" *Id.* at 388 (emphasis added). *Bush* does not hold that the employment relationship cannot give rise to "a constitutional tort," let alone touch upon the scope of the rights of government employees under

2) Next, Petitioners seek to analogize this case to *Wyman* v. *James*, 400 U.S. 309 (1971), which held that a social worker's home visitation for the purpose of monitoring health and decency conditions and verifying justification for financial assistance was not a search "in the Fourth Amendment meaning of that term." (Pet. Br. at 12-13, *quoting id.* at 317.) In so doing, Petitioners wrest out of context *Wyman*'s distinction between such visitations and a "search in the traditional criminal law context." *Id.* It is plain that the quoted passage cannot be taken—and we do not believe that it was intended in *Wyman*—to be a holding that a search for Fourth Amendment purposes can arise only out of a criminal investigation.[9] *T.L.O.* disapproved just that proposition, observing that:

> this court has never limited the amendment's prohibition on unreasonable searches and seizures to operations conducted by the police. Rather, the Court has long spoken of the Fourth Amendment's strictures as restraints imposed upon "governmental action"—that is, "upon the activities of sovereign authority." *Burdeau* v. *McDowell*, 256 U.S. 465, 475. 105 S.Ct. at 740.

3) Petitioners also rely on two "business inspection cases that hold voluntary entry into an industry 'closely regulated' by government removes reasonable expectations of privacy related to the object of regulation." (Pet. Br. at 13-14, *citing United States* v. *Biswell*, 406 U.S. 311 (1972), *Colonnade Catering Corp.* v. *United*

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any constitutional provision. Nor does the case affect the remedy Congress has provided in 42 U.S.C. § 1983 for constitutional violations under color of state law.

[9] In the immediately succeeding sentence the *Wyman* opinion notes "that the visitation in itself is not forced or compelled, and that the beneficiary's denial of permission is not a criminal act." *Id.* In this respect, *Wyman* differs *toto coelo* from the forced entry in this case, which Respondent was given no opportunity to prevent.

States, 397 U.S. 72 (1970).) The limited scope of those decisions was stressed by this Court when the Solicitor General relied on them in *Marshall* v. *Barlow's Inc.*, 436 U.S. 307, 309 (1978), to urge the constitutionality of warrantless searches by agents of the Secretary of Labor to inspect the work areas of employment facilities for safety hazards and violations of regulations:

> Certain industries have such a history of government oversight that no reasonable expectation of privacy, see *Katz* v. *United States*, 389 U.S. 347, 351-352 (1967), could exist for a proprietor over the stock of such an enterprise. Liquor (Colonnade) and firearms (Biswell) are industries of this type; when an entrepreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of governmental regulation. * * * The element that distinguishes these enterprises from ordinary businesses is a long tradition of close government supervision, of which any person who chooses to enter such a business must already be aware. "A central difference between those cases [*Colonnade* and *Biswell*] and this one is that businessmen engaged in such federally licensed and regulated enterprises accept the burdens as well as the benefits of their trade, whereas the petitioner here was not engaged in any regulated or licensed business. The businessman in a regulated industry in effect consents to the restrictions placed upon him." *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 271 (1973). The clear import of our cases is that the closely regulated industry of the type involved in *Colonnade* and *Biswell* is the exception. The Secretary would make it the rule. 436 U.S. at 313.

Like the Solicitor General in *Barlow's*, Petitioners here contend:

> In the context of supervision and administration, a government agency's access to the offices of its employees, and the contents of those offices, cannot be conditioned upon prior compliance with standards of Fourth Amendment protection. (Pet. Br. at 13.)

They thus would make it the "rule" rather than the "exception" that the warrant requirement of the Fourth Amendment does not apply to government employers' entry into and search of their employees' offices. Under this argument, the warrant requirement would be inapplicable generally, rather than only to some specially sensitive governmental employment (such as police and other security forces)[10] or where there is particular danger of theft of government property,[11] and without regard to the nature and extent of the search. This argument is oblivious to the history and purpose of the Fourth Amendment's Warrant Clause as reaffirmed in *Barlow's*:

> The Warrant Clause of the Fourth Amendment protects commercial buildings as well as private homes. To hold otherwise would belie the origin of that Amendment, and the American colonial experience. * * * The general warrant was a recurring point of contention in the Colonies immediately preceding the Revolution. The particular offensiveness it engendered was acutely felt by the merchants and businessmen whose premises and products were inspected for compliance with the several parliamentary revenue measures that most irritated the colonists. "[T]he Fourth Amendment's commands grew in large measure out of the colonists' experience with writs of assistance * * * [that] granted sweeping power to customs officials and other agents of the King to search at large for smuggled goods." *United States* v. *Chadwick*, 433 U.S. 1, 7-8 (1977). * * * Against this background, it is untenable that the ban on warrantless searches was not intended to shield places of business as well as of residence. 436 U.S. at 311-12 (footnotes omitted).

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[10] *Cf. United States* v. *Speights*, 557 F.2d 362 (3d Cir. 1977).

[11] *Cf. United States* v. *Bunkers*, 521 F.2d 1217 (9th Cir.), *cert. denied*, 423 U.S. 989 (1975); *United States* v. *Collins*, 349 F.2d 863 (2d Cir. 1965), *cert. denied*, 383 U.S. 960 (1966); *Chenkin* v. *Bellevue Hospital Center, New York City Health & Hospitals Corp.*, 479 F. Supp. 207 (S.D.N.Y. 1979).

Of course, *Barlow's* and the other decisions in this Court which uphold a warrant requirement for the search of places of business do not address the precise question whether warrants can be dispersed with in all or some government employment contexts. But they do show that that issue cannot be decided by invoking the *Colonnade* and *Biswell* cases, which "represent responses to relatively unique circumstances"—liquor and firearms regulation. For, "effective supervision of its employees" by government (Pet. Br. at 13), though a weighty concern, is no more so than the public interest in employee safety and health, which is the goal of OSHA (as in *Barlow's*), or in the collection of taxes (as in *G.M. Leasing Corp. v. United States*, 429 U.S. 338 (1977)).

Moreover, as we have shown in Part I, *supra*, Petitioners' search would be unconstitutional even without regard to the Warrant Clause, because the search was plainly unreasonable. The *Colonnade-Biswell* exception does not touch upon that question at all.

B. Petitioners contend that their conduct did not breach any "privacy expectation that society is prepared to recognize as reasonable." (Pet. Br. at 14; upper case omitted.) The heart of Petitioners' position is their assertion that a "public employee's right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with the need of agency officials and supervisors to have access to the offices of public employees, and their contents, to monitor performance, administratively investigate work-related conduct, or merely to retrieve government records." (Pet. Br. at 16.)

This assertion of need, even if wholly justified (as it is not, see pp. 17-19, *infra*), would not justify the sweeping denial of privacy that Petitioners press upon this Court. Individual expectations of privacy are not unreasonable for purposes of the Fourth Amendment simply because the government has a need to make an unfettered search. Thus, while recognizing that "unless

Government safeguards its own capacity to function and to preserve the security of its people, society itself could become so disordered that all rights and liberties would be endangered," this Court nevertheless held that the Fourth Amendment's warrant requirement applies to electronic surveillance of telephone conversations in domestic security investigations. *United States* v. *United States District Court*, 407 U.S. 297, 312 (1972).

The recent decision in *T.L.O.*, *supra*, is again very much in point. The Court recognized "the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds," and described in some detail the seriousness of disciplinary problems in the schools. 105 S.Ct. at 742-43. Nevertheless, the Court rejected the State's contention that students in the public schools may claim no legitimate expectation of privacy. *Id.* at 742. Instead, the Court determined the scope of the Fourth Amendment in a school setting on the basis of a "balance between the schoolchild's legitimate expectations of privacy and the school's equally legitimate need to maintain an environment in which learning can take place." *Id.* at 743. Even the Solicitor General acknowledges that "the employer recognizes that the employee may elect to keep some personal items in his office, [although] it is plainly the understanding of all concerned that the office will be used primarily for work-related purposes." (U.S. Br. at 9.) These "items" normally include private papers and correspondence. Unless directed otherwise by their employers, many individuals use their offices during nonworking hours for private correspondence, paying bills, preparing their tax returns and the like. If the employees' expectation of privacy in such materials is no longer one "that society is prepared to recognize as 'reasonable,'" it will cease to be the society the framers of the Fourth Amendment envisioned.

C. We may readily grant that there is frequently a "need of agency officials and supervisors to have access

to the offices of public employees." (Pet. Br. at 16.) But it is a substantial and unjustified leap from the indisputable fact "that in the ordinary course of business many employment situations occasionally involve routine unconsented entries into an employee's office for work-related purposes" (U.S. Br. at 11) to the conclusion that public employees can never have a reasonable expectation that their offices will not be entered. Where, as in the present case, employees have been permitted to and do lock their office doors, their expectation that their offices will not be entered without their knowledge and consent is wholly justified.[12] *See, e.g., U.S.* v. *Speights*, 557 F.2d 362, 364 (3d Cir. 1977);[13] *Gillard* v. *Schmidt*, 579 F.2d 825, 828-29 (3d Cir. 1978). They will thus leave private materials where they would not be when others are likely to come into their office (as in business hours), and the materials would be subject to view. The denial of a right of privacy in this situation is not necessary to enable agency officials and fellow employees to have ac-

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[12] Of course, the situation would be otherwise if employees have been put on notice that their employer has a key and may enter at any time. *Cf. Chenkin* v. *Bellevue Hosp. Ctr., N.Y.C., Etc.*, 479 F. Supp. 207, 215 (S.D.N.Y. 1979). The importance of the reliance element is also shown by *United States* v. *Blok*, 188 F.2d 1019 (D.C. Cir. 1951), on which Petitioners mistakenly place reliance. In the passage which follows immediately beyond that which is quoted at Pet. Br. at 16, the Court said:

> *In the absence of a valid regulation to the contrary appellee was entitled to, and did keep private property of a personal sort in her desk.* Her superiors could not reasonably search the desk for her purse, her personal letters, or anything else that did not belong to the government and had no connection with the work of the office. 188 F.2d at 1021, emphasis added.

[13] The "criminal nature of the investigation in *Speights*" (Pet. Br. at 18) is, of course, irrelevant to the reasonableness of the employee's expectation of privacy prior to any search (see pp. 11-12, *supra*). Thus, even if this fact were otherwise relevant, Petitioners' attempt to distinguish *Speights* would be untenable.

cess to offices in the normal course of a working day "to obtain a file or piece of correspondence, or borrow a paper clip" (Pet. Br. at 16), or for other purposes.

Accordingly, the proposition that public employees never have a reasonable expectation that their offices will not be entered cuts too deeply into the privacy interests protected by the Fourth Amendment. Since the Respondent in this case clearly had a reasonable expectation that his office would not be unlocked and entered (see pp. 15-17, *supra*), it is unnecessary for the Court to decide under what circumstances such an expectancy would be unreasonable, and this is a matter better left for decision on a case-by-case basis.[14]

Even less plausible is Petitioners' contention, not joined by the United States, that the employee does not have a reasonable expectation of privacy in his office desk or file cabinet.[15] Although Petitioners grandly assert that "[s]ociety has no interest in government offices, desks, and file cabinets becoming citadels of inefficiency" (Pet. Br. at 16), they fail to demonstrate that they will become such "citadels" unless agency officials enjoy an unfettered right to enter and search.[16] But the experience of centuries lies behind the societal interest which is truly at stake in this case, and which underlies the Fourth Amendment

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[14] The question of how extensive an examination of materials that are not hidden from view may be permitted after a constitutionally-permitted entry is not presented by this record.

[15] To be sure, where a file cabinet contains only work-related materials, or is one to which other employees have regular access, the expectation of privacy would ordinarily be unreasonable; but this does not justify a blanket exclusion of office file cabinets from Fourth Amendment protection.

[16] Of course, public employees can be required by their superiors to yield up government records or other work-related papers; but Petitioners, having required Respondent to take administrative leave, cannot rely on his consequent inability to give them any materials that they might legitimately have sought.

—"to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Camara* v. *Municipal Court*, 387 U.S. 523, 528 (1967).

CONCLUSION

For the reasons stated herein, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DENNIS M. O'CONNOR, *et al.*,

Petitioners,

v.

MAGNO J. ORTEGA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF JUDGMENT BELOW

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QUESTIONS PRESENTED

1(a). Whether, in the absence of any regulation or established policy to the contrary, a public employee has a reasonable expectation of privacy in his office, including his desk and file cabinets, when that office has never been entered without the employee's permission and remains locked when he is not present.

(b). Whether, in circumstances where a public employee has a reasonable expectation of privacy in his office, a comprehensive search of that office designed to uncover personal materials for use against the employee in a termination proceeding may be conducted whenever the employee's supervisor, in his sole discretion, determines that the search is in furtherance of any work-related concern.

TABLE OF CONTENTS

	Page
STATEMENT	1
SUMMARY OF ARGUMENT	4
ARGUMENT	6
I. A PUBLIC EMPLOYEE'S EXPECTATION OF PRIVACY IN HIS OFFICE, DESK AND FILE CABINETS IS ENTITLED TO FOURTH AMENDMENT PROTECTION	6
A. An Employee's Subjective Expectation of Privacy In His Office, Desk And File Cabinets Is Recognized By Society As Reasonable	7
B. The Government's Interests As Owner And Employer Do Not Render A Public Employee's Expectation Of Privacy Unreasonable	12
II. AN INVESGATIVE SEARCH BY A GOVERNMENT EMPLOYER MUST BE CONDUCTED PURSUANT TO A WARRANT BASED ON PROBABLE CAUSE OR, AT A MINIMUM, SOME QUANTUM OF INDIVIDUALIZED SUSPICION, NEITHER OF WHICH WAS PRESENT HERE	25
A. An Exhaustive Office Search For Personal Evidence To Be Used Against A Public Employee Under Investigation Requires A Warrant Based On Probable Cause	26
1. The Traditional Standard Of Reasonableness And Its Limited Exceptions	27
2. Investigative Work-Related Office Searches	30
a. The Analogy To School Searches	31
b. The Government's Need For Efficiency And The Competing Individual Interests	33
B. Even Under A Minimalist "Reasonable Suspicion" Standard The Search Of Respondent's Office Was Invalid	40
CONCLUSION	44

TABLE OF AUTHORITIES

Page

CASES:

Arkansas v. *Sanders*, 442 U.S. 753 (1979) 19, 27
Bell v. *Wolfish*, 441 U.S. 520 (1979) 29
Board of Regents v. *Roth*, 408 U.S. 564 (1972) 17, 36
Brinegar v. *United States*, 338 U.S. 160, 176 (1949) 29
Cafeteria & Restaurant Workers Union, Local 473 v. *McElroy*, 376 U.S. 886 (1961) 17
California v. *Ciraolo*, 54 U.S.L.W. 4471 (U.S. May 19, 198 27
Camara v. *Municipal Court*, 387 U.S. 523 (1967) 7, 21, 27, 28, 29, 34, 38
Chapman v. *United States*, 365 U.S. 610 (1961) 14
Chenkin v. *Bellevue Hospital Center*, 479 F. Supp. 207 (S.D.N.Y. 1979) 3, 39
Chocallo v. *Bureau of Hearings and Appeals*, 548 F. Supp. 1349 (E.D. Pa. 1982), *aff'd*, 716 F.2d 889 (3d Cir.), *cert. denied*, 464 U.S. 983 (1983) 35
Colonnade Catering Corp. v. *United States*, 397 U.S. 72 (1970) 23
Connick v. *Myers*, 461 U.S. 138 (1983) 16
Davis v. *United States*, 328 U.S. 582 (1946) 28
Delaware v. *Prouse*, 440 U.S. 648 (1979) ... 23, 34, 39, 40, 41
Donovan v. *A.A. Beiro Construction Co.*, 746 F.2d 894 (D.C. Cir. 1984) 15
Donovan v. *Dewey*, 452 U.S. 594 (1981) 21, 23
Ex Parte Curtis, 106 U.S. 371 (1882) 15
Gardner v. *Broderick*, 392 U.S. 273 (1968) 35, 37, 38
Garrity v. *New Jersey*, 385 U.S. 493 (1967) 6, 16, 37
Gillard v. *Schmidt*, 579 F.2d 825 (3d Cir. 1978) 24
Gouled v. *United States*, 255 U.S. 298 (1921) 10
Hoffa v. *United States*, 385 U.S. 293 (1966) 10
Hudson v. *Palmer*, 104 S. Ct. 3194 (1984) 12, 13
Jafree v. *Scott*, 372 F. Supp. 264 (N.D. Ill. 1974), *aff'd in part, rev'd in part*, 519 F.2d 1405 (7th Cir. 1975) ... 35
Katz v. *United States*, 389 U.S. 347 (1967) 8, 10, 18
Lanza v. *New York*, 370 U.S. 139 (1962) 13
Lefkowitz v. *Cunningham*, 431 U.S. 801 (1977) 37
Lo-Ji Sales, Inc. v. *New York*, 442 U.S. 319 (1979) 5, 18

Table of Authorities Continued

Page

Mancusi v. *DeForte*, 392 U.S. 364 (1968)... 4, 11, 18, 20, 21
Marshall v. *Barlow's, Inc.*, 436 U.S. 307 (1978). 8, 10, 23, 28
Michigan v. *Tyler*, 436 U.S. 499 (1978)..... 8
New Jersey v. *T.L.O.*, 105 S. Ct. 733 (1985)..... 5, 6, 8, 13, 27, 29, 31-33, 34, 42
North American Cold Storage Co. v. *City of Chicago*, 211 U.S. 306 (1908)..... 29
Oliver v. *United States*, 104 S. Ct. 1735 (1984)..... 10, 11
Rakas v. *Illinois*, 439 U.S. 128 (1978)..... 9, 14
Rawlings v. *Kentucky*, 448 U.S. 98 (1980)..... 9
Security & Law Enforcement Employees, District Council 82 v. *Carey*, 737 F.2d 187 (2d Cir. 1984)..... 39
See v. *City of Seattle*, 387 U.S. 541 (1967)..... 10
Schmerber v. *California*, 384 U.S. 757 (1966)..... 29
Shaffer v. *Field*, 339 F. Supp. 997 (C.D. Cal. 1972), *aff'd*, 484 F.2d 1196 (9th Cir. 1973)..... 24
Smith v. *Maryland*, 442 U.S. 735 (1979)..... 4, 8, 18, 23
Stoner v. *California*, 376 U.S. 483 (1964)..... 4, 8, 14, 23
Terry v. *Ohio*, 392 U.S. 1 (1968)..... 29, 31, 41
Uniformed Sanitation Men Association v. *Commissioner of Sanitation*, 392 U.S. 280 (1968)..... 37
United States v. *Biswell*, 406 U.S. 311 (1972)..... 23
United States v. *Blok*, 188 F.2d 1019 (D.C. Cir. 1951). 23, 38
United States v. *Brignoni-Ponce*, 422 U.S. 873 (1975) .. 29
United States v. *Bunkers*, 521 F.2d 1217 (9th Cir.), *cert. denied*, 423 U.S. 989 (1975)..... 24
United States v. *Collins*, 349 F.2d 863 (2d Cir. 1965), *cert. denied*, 383 U.S. 960 (1966)..... 24
United States v. *Donato*, 269 F. Supp. 921 (E.D. Pa.), *sum. aff'd*, 379 F.2d 288 (3d Cir. 1967)..... 24
United States v. *Hagarty*, 388 F.2d 713 (7th Cir. 1968).. 23
United States v. *Karo*, 104 S. Ct. 3296 (1984)..... 5, 27, 29
United States v. *Lefkowitz*, 285 U.S. 452 (1932)..... 10
United States v. *Martinez-Fuerte*, 428 U.S. 543 (1976) 40, 41
United States v. *Matlock*, 415 U.S. 164 (1974)..... 14, 15
United States v. *McIntyre*, 582 F.2d 1221 (9th Cir. 1978) 24

Table of Authorities Continued

	Page
United States v. *Nasser*, 476 F.2d 1111 (7th Cir. 1973) ..	23
United States v. *Place*, 462 U.S. 696 (1983)	31
United States v. *Sanders*, 568 F.2d 1175 (5th Cir. 1978) .	24
United States v. *Speights*, 557 F.2d 362 (3d Cir. 1977)...	23
United States v. *United States District Court*, 407 U.S. 297 (1972).....	27, 28
United States v. *Villamonte-Marquez*, 103 S. Ct. 2573 (1983)	41
Williams v. *Collins*, 728 F.2d 721 (5th Cir. 1984).....	24, 25
Wilson v. *United States*, 221 U.S. 361 (1911)	6

STATUTES:

Cal. Civil Code § 56-56.16	9

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF JUDGMENT BELOW

STATEMENT

This case involves a search of a government employee's office, including his desk and file cabinets, conducted to uncover evidence relating to charges of employment violations pending against him. Respondent, Dr. Magno Ortega, is a psychiatrist who worked at Napa State Hospital, a California facility for the mentally ill, from 1964 until his termination in 1981. During that time, he served as Chief of Professional Education, with primary responsibility for training physicians in psychiatric residency programs. In 1981, when the events relevant to this litigation occurred, Dr. O'Connor was the Executive Director of Napa and the other petitioners were key administrative and clinical personnel.

On July 30, 1981, Dr. O'Connor advised Dr. Ortega of his "intentions to investigate management practices of your department." J.A. 8.[1] The investigation was being conducted primarily because of concerns about the way in which Dr. Ortega had purchased a computer for use in the residency program. The allegations were that Ortega had misled Dr. O'Connor into believing that the computer had been donated when, in fact, he had pressured the residents into contributing to its cost, and that he had taken disciplinary action against a resident who resisted

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[1] Dr. O'Connor also requested on July 30 that Ortega go on administrative leave during the investigation; he agreed to allow him to take a two-week vacation instead, so long as he remained off hospital grounds. Thereafter, in a letter dated August 14, 1981, O'Connor advised Ortega that the investigation had not been completed and that he was being placed on administrative leave as of August 17, 1981. Dr. Ortega was paid his salary during this leave period until his termination on September 22, 1981. J.A. 8, 9, 29-30.

his efforts. In addition, two hospital workers had charged that Dr. Ortega made sexual advances toward them. J.A. 30-33, 49.[2]

To conduct the investigation, Dr. O'Connor selected three hospital personnel, including the administrator and an internal hospital security officer. As part of their investigation, these officials repeatedly went into Dr. Ortega's office—a locked private office that he had occupied during his entire seventeen years at the hospital and which apparently had never previously been entered when he was not present. J.A. 14. To gain access, the investigators first used a pass key and later changed the locks. All entries were made in the evening when no one else was in the area. J.A. 53, 58.

Once in the office, the investigators thoroughly examined its contents. They took a Valentine's card, a private photograph, and a book of poetry—all personal items given to Dr. Ortega ten years earlier by a former resident—as well as some documentation regarding his billings of a private (non-hospital) patient under the California Medicaid program. No inventory of the property in the office was made, nor were any state papers or files retrieved. Rather, after seizing the items just mentioned, the investigators placed all of the remaining papers in boxes and then put them in storage for Ortega to pick up. J.A. 15, 42, 54-58, 62. Subsequently, at Dr. Ortega's termination hearing, when he sought to introduce the testimony of his former resident, the state's attorney first threatened to, and then did, attempt to impeach her by

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[2] These claims were subsequently upheld in an administrative hearing before the California State Personnel Board. Pet. App. 9-15. That decision is currently on appeal in state court.

introducing the personal materials taken from Dr. Ortega's office. J.A. 10, 15.

Based on the search of his office and seizure of his papers, Dr. Ortega filed the instant action in July 1982, alleging Fourth Amendment violations as well as pendent state law privacy claims. On cross-motions for summary judgment, the district court ruled orally for petitioners on all counts. Relying on *Chenkin* v. *Bellevue Hospital Center*, 479 F. Supp. 207 (S.D.N.Y. 1979), the court found that the search was proper since there was a need to "secure the office" in order to protect "[s]tate property." J.A. 23. The court also stated that the "[s]eizure of personal effects may seem overly intrusive, but the degree of intrusion was minimized, once again, by the consideration of the plaintiff was aware of the investigations and could have participated." *Ibid.*[3]

The Court of Appeals for the Ninth Circuit reversed on the § 1983 claim.[4] It first noted that Ortega's locked office, which contained personal papers and "sensitive and confidential information about patients or people with whom he dealt, had never been entered without his permission." Pet. App. 4. It also pointed out that "Napa had never instituted surveillance or searches and had no general inspection policy that might have defeated Ortega's

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[3] Later in the same hearing, the court acknowledged that this conclusion may have been incorrect and indicated that a motion for reconsideration would be in order. J.A. 24-25. None was filed, however, even though the record is clear that Dr. Ortega did not know that the searches were taking place and was never asked to participate. J.A. 40.

[4] The court affirmed the dismissal of the state law claims on the ground that they had not first been filed with a state board as required under California law. Pet. App. 7.

expectation of privacy in his office." Pet. App. 6. In these circumstances, the court concluded, Ortega had "a subjective expectation of privacy in his office that society is prepared to recognize and protect as reasonable." Pet. App. 4. The court further found that the search in question had violated respondent's Fourth Amendment rights, noting that "[t]he entry into Ortega's office seems to have been for no other purpose than to secure evidence for use in the ongoing investigation of Ortega." Pet. App. 6. Based on these rulings, summary judgment was granted for Ortega and the case was remanded for a determination of damages.

SUMMARY OF ARGUMENT

1. The Fourth Amendment protects individuals against unreasonable searches and seizures in circumstances where they have a legitimate expectation of privacy. To have such an expectation, an individual must demonstrate a subjective intent to preserve his privacy, and society must be willing to recognize his expectation as reasonable. *See, e.g., Smith* v. *Maryland*, 442 U.S. 735, 740 (1979). In the instant case, respondent's subjective expectation was indisputable: he kept personal materials in a locked office that had never before been entered without his permission. An employee's expectation of privacy within his work office, moreover, is one that society is prepared to recognize as reasonable. *See Mancusi* v. *DeForte*, 392 U.S. 364, 368-70 (1968).

The government's interests as owner and employer are not sufficient to defeat a public employee's reasonable expectation of privacy. Legitimate ownership interests can be satisfied without sacrificing the non-owner occupant's basic Fourth Amendment protections. *See, e.g., Stoner* v. *California*, 376 U.S. 483, 489-90 (1964). Like-

wise, the government's interest in operating an efficient workplace is not incompatible with respecting an employee's expectation of office-based privacy. Even assuming that an employee typically may not reasonably expect that supervisors or co-workers will never enter his office when he is not present, that does not mean that his whole office, including the desk and file cabinets, is open to routine scrutiny. *See, e.g., Lo-Ji Sales, Inc.* v. *New York*, 442 U.S. 319, 329 (1979). The contrary position taken by petitioners would allow any governmental authority, including the police, to search a public employee's office for any reason whatsoever. Such a result, aside from providing public employees with less Fourth Amendment protection than private employees, denigrates important constitutional interests for no legitimate reason.

2. The warrantless search of respondent's office in the circumstances of this case was impermissible. "Warrantless searches are presumptively unreasonable, though the Court has recognized a few limited exceptions to this general rule." *United States* v. *Karo*, 104 S. Ct. 3296, 3304 (1984). None of these exceptions apply here, however. The search was focused on a particular individual under investigation for having committed serious workplace violations, and was neither limited in scope nor conducted under exigent or special circumstances. Petitioners' attempt to analogize this case to the school search involved in *New Jersey* v. *T.L.O.*, 105 S. Ct. 733 (1985), is unconvincing. The special needs of the school environment—including particularly the need to maintain order and discipline when dealing with youngsters—are not a comparable concern in the workplace.

Nor is the government's need to maintain an efficient workplace adequate to support a watered-down standard

of Fourth Amendment reasonableness for an investigative work-related search. Most relevant to satisfying that need, of course, is the employer's ability to observe his employees, speak with their supervisors and co-workers, and review the business records and files that they use in their work. Significantly, an employer can accomplish all of those things without a search; even when it wants to access to business papers used or prepared by an employee, they must be yielded on demand. *See Wilson* v. *United States*, 221 U.S. 361, 380 (1911). Thus, the only material that a government employer cannot secure without a search is the private papers and effects that an employee keeps in his office. When an employer seeks access to that material, however—to use as evidence against an employee in a job termination proceeding—the relevant individual and government interests at stake are very similar to those involved in a criminal investigation and, therefore, support application of the traditional Fourth Amendment standard of a warrant based on probable cause. *Cf. Garrity* v. *New Jersey*, 385 U.S. 493 (1967) (protection of a public employee's Fifth Amendment privilege against self-incrimination).

In any event, petitioners' assertion that an office search by a government employer should be found reasonable whenever it is conducted for a work-related purpose is unsupportable. Any investigative search that is focused on a particular individual must, at a minimum, be based on reasonable suspicion. *See New Jersey* v. *T.L.O.*, *supra*, 105 S. Ct. at 744. Even under that standard, the instant search was improper.

ARGUMENT

I. A PUBLIC EMPLOYEE'S EXPECTATION OF PRIVACY IN HIS OFFICE, DESK AND FILE CABINETS IS ENTITLED TO FOURTH AMENDMENT PROTECTION.

Petitioners surreptitiously entered respondent's locked work office and thoroughly searched it as well as his desk

and file cabinets. They seized several personal documents for use in an ongoing investigation that led to the firing of respondent, and then placed everything else in boxes for his retrieval. On these facts, petitioners take the position that their activities do not even implicate the Fourth Amendment since, in their view, a public employee can never have a legitimate expectation of privacy in his office, desk or file cabinets. This categorical position has little to recommend it, to say nothing of the fact that it flies in the face of basic Fourth Amendment principles.

As we show, an employee frequently expects his office to be a place where he can safely keep private materials. This expectation is plainly a reasonable one, and is entitled to Fourth Amendment protection. There is nothing about the government's interests as owner or employer that justifies the total obliteration of its employees' office-based privacy. That extreme view would cut a broad swatch in individual privacy, and would do so for reasons that go far beyond any legitimate government interests that might be at stake.

A. An Employee's Subjective Expectation Of Privacy In His Office, Desk And File Cabinets Is Recognized By Society As Reasonable.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." "The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Camara* v. *Municipal Court*, 387 U.S. 523, 528 (1967). Consistent with this purpose, the scope of the Amendment's protection has been expanded far beyond the "paradigmatic entry into a private dwelling by a law enforcement officer in search of

the fruits or instrumentalities of crime." *Michigan* v. *Tyler*, 436 U.S. 499, 504 (1978). It also covers individuals in a variety of other circumstances, *see, e.g.*, *Katz* v. *United States*, 389 U.S. 347, 352 (1967) (public telephone); *Stoner* v. *California*, *supra*, 376 U.S. at 490 (hotel room), and even when the purpose of a search or seizure is to enforce a civil or an administrative requirement, *see, e.g.*, *New Jersey* v. *T.L.O.*, *supra*, 105 S. Ct. at 741 (school rules); *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978) (federal work-safety regulations).

The applicability of the Amendment in any particular case depends on whether the person invoking it "can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expection of privacy' that has been infringed by government action." *Smith* v. *Maryland*, *supra*, 442 U.S. at 740. This inquiry, in turn, "normally embraces two discrete questions. The first is whether the individual, by his conduct, has 'exhibited an actual (subjective) expectation of privacy,' . . . The second question is whether the individual's subjective expectation of privacy is 'one that society is prepared to recognize as reasonable.'" *Ibid.*, quoting *Katz* v. *United States*, *supra*, 389 U.S. at 361 (Harlan, J. concurring).

In the instant case, respondent's subjective expectation of privacy in his office at Napa State Hospital is not disputed. Nor could it be. He had occupied the same office (which bore his name) for seventeen years. During that time, so far as the record reveals, the office had *never* been entered without respondent's permission. It was locked when he was not present and, with the exception of the furnishings, everything else that was stored in the office belonged to him. Significantly, this included the psychiatric records of his private (non-hospital) patients, records that under California law respondent is required to

keep confidential. *See* Cal. Civil Code § 56-56.16. In addition, respondent also kept personal correspondence and memorabilia as well as personal financial information in the office. J.A. 14.[5]

In contrast to these personal materials, the hospital records and files that respondent worked with were not stored in his office, but were kept instead in file cabinets located in the adjoining secretarial area. J.A. 14, 21. Not surprisingly, therefore, except for the items that were seized for use in the investigation—which were clearly personal, J.A. 42—petitioners agreed that Ortega could have back everything else that had been taken from the office. J.A. 58, 62. Collectively, these considerations amply demonstrate that Dr. Ortega certainly considered his office to be a place where he could safely keep private items, and that, if anything, he "took [more than] normal precautions to maintain his privacy." *Rawlings* v. *Kentucky*, 448 U.S. 98, 105 (1980).

Turning next to the objective element of the Fourth Amendment test, it is settled that "no single factor invariably will be determinative" of this inquiry. *Rakas* v.

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[5] According to Dr. Ortega's uncontroverted affidavit, the following materials were stored in his office:

"(a) Purely personal correspondence from friends and family.

(b) Photographs of friends, acquaintances, and family.

(c) Medical files and correspondence from private patients unconnected to Napa State Hospital.

(d) Appointment books and personal notes, as well as official appointments.

(e) Personal financial records and accounts.

(f) A file approximately 18 feet long of IBM cards containing teaching aids and notes.

(g) Personal souvenirs, gifts and presents belonging to plaintiff.

(h) Copyrighted manuscript." J.A. 14.

Illinois, 439 U.S. 128, 152 (1978) (Powell, J. concurring). Thus, "the Court has given weight to such factors as the intention of the Framers of the Fourth Amendment, the uses to which the individual has put a location, and our societal understanding that certain areas deserve the most scrupulous protection from government invasion." *Oliver* v. *United States*, 104 S. Ct. 1735, 1741 (1984) (citations omitted). Tested against these criteria, it is clear that an employee's expectation of privacy in his business office is one that "society is prepared to recognize as 'reasonable.'" *Katz* v. *United States*, *supra*, 389 U.S. at 361 (Harlan, J. concurring).

To begin with, as the Court has already noted, "[t]he Fourth Amendment's protection of offices and commercial buildings . . . [is] based upon societal expectations that have deep roots in the history of the Amendment." *Oliver* v. *United States*, *supra*, 104 S. Ct. at 1741 n.8; *see also Gouled* v. *United States*, 255 U.S. 298, 303-05 (1921); *United States* v. *Lefkowitz*, 285 U.S. 452, 464 (1932). This historical view is reinforced by contemporary understandings as well. As the Court put it in *Hoffa* v. *United States*, 385 U.S. 293, 301 (1966) (footnote omitted), "[w]hat the Fourth Amendment protects is the security a man relies upon when he places . . . his property within a constitutionally protected area, be it his home or his office, his hotel room or his automobile. . . . And when he puts something in his file cabinet, in his desk drawer, or in his pocket, he has the right to know it will be secure from an unreasonable search or an unreasonable seizure." *See also See* v. *City of Seattle*, 387 U.S. 541, 543 (1967); *Marshall* v. *Barlow's Inc.*, *supra*, 436 U.S. at 312.

For most people, next to the home, the office—where they usually spend the majority of their waking hours—is the most significant enclave of privacy that they enjoy.

While it is true that "it is plainly the understanding of all concerned that the office will be used primarily for work-related purposes," U.S. Br. at 9, it is also true that everyone understands that a reasonable amount of private activity will take place there as well. It is well known, for example, that individuals make and receive private calls on their office phones, even though such phones are provided for work-related purposes. Similarly, individuals sometimes receive private correspondence at the office, frequently marked "personal and confidential" so as to ensure that it will not be opened along with the business mail. These letters, as well as other private material—such as personal financial papers that an individual may work on during a free lunch hour or coffee break—are often kept at the office, at times, perhaps, because a person may wish to keep certain matters private even from those with whom he lives.

These understandings about office-based privacy plainly extend to employees as well as employers. Indeed, the legitimacy of an employee's office-based expectation of privacy has already been upheld by this Court on facts that were considerably less compelling than those presented here. In *Mancusi* v. *DeForte*, *supra*, 392 U.S. at 368-70, a union official who *shared* offices with other employees was found to have a sufficient privacy interest to allow him successfully to suppress criminal evidence secured through a warrantless search that led to the seizure of *union* records. This broad view of employee privacy is consistent with the recognition that an office is among the areas that "deserve the most scrupulous protection from government invasion." *Oliver* v. *United States*, *supra*, 104 S. Ct. at 1741.

These established principles notwithstanding, petitioners take the view that, by working for the govern-

ment, an employee loses all constitutional protection with respect to the privacy of his office, desk and file cabinets. That position simply cannot withstand scrutiny, however. On the contrary, the government's legitimate needs as owner and employer can be fully satisfied without undermining a public employee's reasonable expectation of privacy.

B. The Government's Interests As Owner And Employer Do Not Render A Public Employee's Expectation Of Privacy Unreasonable.

Noting that the government has different interests at stake with regard to its own as compared to private employees, petitioners argue that these interests are sufficient to eliminate all office privacy for government employees. That position, aside from creating the curious anomaly that public employees would have *less* Fourth Amendment protection than private employees, rests on a misconception of the scope and effect of the government's legitimate interests. If accepted, it would provide the government, including law enforcement officials, with a license to search a public employee's office, desk or file cabinets for any reason, whether employment-related or not.

The Fourth Amendment is not so easily brushed aside. Only recently the Court made plain that it proceeded with "caution in approaching claims that the Fourth Amendment is inapplicable in a given context." *Hudson* v. *Palmer*, 104 S. Ct. 3194, 3200 (1984). A sharply divided Court in that case, resting on the "paramount interest in institutional security," *id.* at 3201, nevertheless held that "[t]he recognition of privacy rights for prisoners in their individual cells simply cannot be reconciled with the concept of incarceration and the needs and objectives of penal

institutions," *id.* at 3200. Significantly, the Court pointed out that "[a] prison, 'shares none of the attributes of privacy of a home, an automobile, an *office*, or a hotel room.'" *Ibid.*, quoting *Lanza* v. *New York*, 370 U.S. 139, 143-44 (1962) (emphasis supplied).

In contrast to the prison situation, the Court during the following Term unanimously rejected the suggestion that "school officials are exempt from the dictates of the Fourth Amendment by virtue of the special nature of their authority over schoolchildren." *New Jersey* v. *T.L.O.*, *supra*, 105 S. Ct. at 741. Although the State asserted "the fundamental incompatibility of expectations of privacy with the maintenance of a sound educational environment," and although the Court took "notice of the difficulty of maintaining discipline in the public schools today," it concluded nonetheless that "the situation is not so dire that students in the schools may claim no legitimate expectations of privacy." *Id.* at 742.

Taken together, these cases strongly suggest that petitioners' position in this case is misguided. Even on cursory reflection, it is difficult to see why a government workplace should be unable to tolerate at least as much individual privacy as, if not considerably more than, a public school does.[6] A more thorough analysis confirms this conclusion as well. The particular government inter-

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[6] The Court in *New Jersey* v. *T.L.O.*, *supra*, 105 S.Ct. at 741 n.5, did not "address the question, not presented by [that] case, whether a schoolchild has a legitimate expectation of privacy in lockers, desks, or other school property provided for the storage of school supplies." However such a case might come out, we think it is clear that differences between the schoolhouse and workplace strongly support a greater measure of privacy for an employee's desk than for a pupil's. It is well recognized, we submit, that significantly more private activity legitimately takes place in the office than at school.

ests at issue in the present context—its ownership interest in the office and its employment relationship with the occupant—are simply not sufficient to justify the total elimination of a public employee's office-based privacy.

As for the first consideration, it is clear that ownership does not confer Fourth Amendment protection, nor does its absence defeat it. The "capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." *Rakas* v. *Illinois*, *supra*, 439 U.S. at 143. To be sure, an individual's expectation of privacy in an area that he does not own may be limited to the extent necessary to allow for appropriate entries by the owner—to provide cleaning, maintenance or repair services, for example. But that commonsense recognition has never been found sufficient to justify either the elimination of the occupant's privacy expectation or the suggestion that the owner can consent to a search of the premises. *See, e.g.*, *Chapman* v. *United States*, 365 U.S. 610 (1961) (occupant of a rented house has legitimate expectation of privacy that owner cannot defeat by consenting to search); *Stoner* v. *California*, *supra*, 376 U.S. at 487-90 (hotel guest has legitimate expectation of privacy that clerk cannot defeat by consenting to search).[7]

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[7] This point is underscored by the "common authority" cases, which involve consent to a search by one of several people who use the same property. *See, e.g.*, *United States* v. *Matlock*, 415 U.S. 164, 169-71 (1974). "Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third party consent . . . rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that

It makes no difference in this regard whether the property is owned by the government or by a private party since the expectations of the occupant as well as the intrusions on privacy that are necessary to protect the owner's interests are identical in both situations. *See Donovan* v. *A.A. Beiro Construction Co.*, 746 F.2d 894, 898-99 & n.3 (D.C. Cir. 1984) (consent to search not supported by government's ownership of construction site). In sum, much as the government can protect its ownership interest in public housing without destroying the reasonable privacy expectations of its residents, it can protect its ownership interest in an office and its furnishings without destroying the reasonable privacy expectations of its occupant. Even petitioners do not suggest the contrary.

Petitioners do, however, attempt to defeat the legitimacy of a public employee's privacy interest in his office by raising a variety of employment-related claims based on the "government's proper purpose in 'promot[ing] efficiency and integrity in the discharge of official duties and to maintain proper discipline in the public service.'" Br. at 10, quoting *Ex Parte Curtis*, 106 U.S. 371, 373 (1882). While the concern about efficiency and integrity is plainly appropriate, the burden that petitioners would have it carry is much too great. First, by invoking the spectre that "government offices could not function if every employment decision becomes a constitutional matter,"

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any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched." *Id.* at 171 n.7. It cannot plausibly be suggested in this case that there was the kind of "common authority" over respondent's office, desk and file cabinets that would justify a search based on the consent of anyone else.

Br. at 10, quoting *Connick* v. *Myers*, 461 U.S. 138, 143 (1983), petitioners caution against recognizing a privacy interest here lest it "convert a work-related dispute or grievance into a constitutional tort." Br. at 12. The argument is both overblown and out-of-date.

The number of office-based searches that lead to constitutional litigation is, by any account, relatively small.[8] While we suspect that this is because most public employers respect their employees' privacy and find that they can maintain an efficient workplace without abridging it, the significant point is that the potential for converting employment disputes into Fourth Amendment claims is far less than the potential for converting such disputes into First Amendment claims: virtually all employment disputes involve some speech; very few involve searches. In view of this distinction, petitioners' suggestion that the application of the Fourth Amendment in the present circumstances will lead to "administrative paralysis" in the workplace, Br. at 21, is clearly untenable.

Moreover, to the extent that petitioners would seek to eliminate *all* work-related claims from the ambit of constitutional protection—to give a public employer "the same right to oversee its employees and investigate job performance as any private employer would have," Br. at 13—that argument comes too late in the day, as *Connick* itself made plain. 461 U.S. at 143-44. It is now well-settled that the government must observe basic constitutional limitations in dealing with its employees. *See, e.g., Garrity* v. *New Jersey, supra* (privilege against self-incrimination);

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[8] Of the twelve previous courts of appeals decisions dealing with office searches, only two were civil actions like the instant one; the others involved motions to suppress in criminal cases. *See* cases cited at pp. 23-24 & notes 15-16, *infra*.

Board of Regents v. *Roth*, 408 U.S. 564 (1972) (procedural due process). As a result, "state and federal governments, even in the exercise of their internal operations, do not constitutionally have the complete freedom of action enjoyed by a private employer." *Cafeteria & Restaurant Workers Union, Local 473* v. *McElroy*, 376 U.S. 886, 897-98 (1961).

Petitioners also argue that the "practical realities of office life render a privacy interest of the type respondent asserts unrealistic and unreasonable from a societal point of view." Br. at 16. The United States joins this argument, explaining that "because of the ordinary operation of the workplace and because of the employer's interest in effectively managing its business, an employee must be aware that from time to time the interior of his office, including items left in the office, will be exposed to the view of his business associates." U.S. Br. at 11-12. Depending on what it means, this position is, at best, inadequate to decide the issue presented here; at worst, it is far broader than necessary to satisfy the concerns that led to it in the first place.

To the extent that the governments are arguing that the practicalities of employment may "occasionally involve routine unconsented entries into an employee's office," U.S. Br. at 11, the claim is beside the point in this case. Not only does it appear that no such entries of respondent's office ever took place but, more significantly, the scope of the search at issue was far greater than the kind of intrusion that results from "[c]ooperative projects [that] often require one employee to enter another's office to borrow a book or to look at a case file." U.S. Br. at 11. Even assuming that an employee cannot reasonably expect that a co-worker or supervisor will *never* enter his

office without his consent,[9] that hardly means that he must abandon all expectations of privacy in every part of his office, including the desk and file cabinets. Anyone who has ever participated in cooperative work projects, we submit, is fully aware that a considerable measure of office-based privacy is completely compatible with such endeavors.

The values protected by the Fourth Amendment are simply too important to be subjected to the kind of all-or-nothing approach proposed by petitioners, as this Court has made clear on a number of occasions. For example, although a business establishment that is open to the public obviously cannot expect absolute privacy, that does not mean that a government agent can search areas or materials beyond those which a customer "would ordinarily see." *Lo Ji Sales, Inc.* v. *New York, supra,* 442 U.S. at 329. Similarly, the fact that a person does not have a legitimate privacy interest in the telephone numbers he calls, *see Smith* v. *Maryland, supra,* hardly means that he has no privacy interest in the contents of those phone conversations, *see Katz* v. *United States, supra. See also Mancusi* v. *DeForte, supra,* 392 U.S. at 377 (White, J. dissenting) (Fourth Amendment may protect private desk in shared office even if it would not protect the office

[9] Whether this is always a reasonable assumption is questionable. At least with respect to certain kinds of offices, such as a university professor's, the general understanding tends to be that the office will be entered by supervisors or co-workers only with the permission of its occupant. For that reason, the office is typically locked when the employee is not present. This may be a legitimate expectation, shared by the employer and employee alike, especially when confidential activity takes place in an office. In that regard, respondent's claim to a broad privacy expectation is particularly strong since he was involved not only in training young doctors, but also in treating psychiatric patients, both of which demand an extreme degree of privacy and confidentiality.

itself). *Cf. Arkansas* v. *Sanders*, 442 U.S. 753 (1979) (warrant required for search of luggage in trunk of automobile even when automobile itself was properly searched without a warrant).

The governments' reliance on routine entries to justify a wholesale elimination of office-based privacy thus sweeps far too broadly. On the other hand, a more sensitive approach—one that limits an individual's expectation of privacy only to the extent necessitated by the practical realities of the workplace—is insufficient to resolve this case. It goes without saying that a search of every area in an employee's office—which included a detailed review of private patient medical records as well as a Valentine's card and book of poetry to see who sent them—is anything but routine. Neither petitioners nor the United States claims that such practices are typical or commonplace in their respective workplaces. Indeed, petitioners acknowledge that they called "for legal advice before [entering respondent's office]." J.A. 51. That fact hardly suggests that they were conducting a routine office entry.[10]

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[10] Petitioners attempt to confuse this issue by describing their search as an "administrative inventory of the contents of an office assigned to its employee." Br. at 8. As we will show below, this characterization is incomplete, if not downright inaccurate. *See* note 20, *infra*. But even assuming that petitioners were conducting a full-scale office inventory, that activity, while perhaps affecting the reasonableness of a search, *see* p. 39, , *infra*, was by no means routine and thus would not be sufficient to defeat respondent's expectation of privacy in every part of his office. Significantly, petitioners argued in the court below (but not here) that "established hospital policy was to inventory property in the offices of departing or terminated employees to determine which property was state property and which was personal." Pet. App. 3. But the argument was rejected because the record would not support the claim that "inventory searches were

Accordingly, if petitioners' argument is to have any bearing on the facts of this case, the argument must be that a public employee simply has no privacy interest in his office, or in any part of it, that would prohibit the government from exhaustively searching it at will.[11] But that position is not even supported by the rationale that supposedly led to it in the first place.[12] Even by the

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conducted on a regular basis," and certainly Ortega "was never informed that his office could be entered at any time and investigated." Pet. App. 3. In any event, an employee's privacy interest in his office is obviously very different when he is about to leave and his employer needs to get the office ready for a new employee. At the time of the search in this case, however, "Ortega had neither been terminated nor was he scheduled to depart: he was merely on administrative leave pending completion of the investigation." Pet. App. 3. The office was not given to a new employee until several weeks after Ortega was fired in late September, which was long after the search. J.A. 45.

[11] The United States appears to concede this point. Thus, after devoting its whole first argument to the assertion that "[a] government employee has no reasonable expectation that a supervisor or co-employee will not *enter* his office in the course of performing employment-related duties," U.S. Br. at 7 (emphasis supplied), the United States blinks when it reaches the issue in this case: "we acknowledge that there are areas within an office, *such as the interior of a desk*, that present a closer question with respect to the existence of a legitimate expectation of privacy." U.S. Br. at 15 n.9 (emphasis supplied). It then suggests that this issue need not be decided because "petitioners' intrusion was reasonable within the meaning of the Fourth Amendment." *Ibid.* In short, the United States proposes resolution of a non-issue and avoidance of the issue presented.

[12] The *dicta* in *Mancusi* v. *DeForte*, *supra*, to the effect that "DeForte would have been entitled to expect that his . . . records would not be taken except with his permission *or that of his union superiors*," 392 U.S. at 369 (emphasis supplied), cannot fairly be read to suggest that an employee has no expectation of privacy that cannot be defeated by his employer at will. "The papers which were seized in

governments' account, the sole reason for curtailing an employee's privacy is the legitimate demands of the workplace. However strong that justification might be, at most it would support a restriction of office-based privacy no greater than the justification itself—*i.e.*, that any search based on work-related purposes is proper. But that result can be achieved, as petitioners and the United States both realize in the final sections of their respective briefs, by a rule that classifies all work-related searches as reasonable. While we dispute the merits of that position as well, *see* pp. 25-43, *infra*, we think it clear that a broader rule—eliminating a government employee's privacy expectation altogether—needlessly creates the potential for much mischief.

In the absence of any privacy protection, a public employee's office would be fair game for any kind of governmental search—be it a tap on his phone, bug on his wall or search of his desk—conducted for any purpose whatsoever.[13] This would include a search by the police

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[that] case belonged not to DeForte but the Union." *Id.* at 367. Thus, there is no question that appropriate union officials could make use of the records and consent to their production or seizure. *See* p. 34, *infra*. Moreover, even if other union officials could validly have consented to a search of the area where the records were kept—a matter not decided in *Mancusi*, *see* 392 U.S. at 369-70—the only plausible justification for such consent would have been that, in a shared office, several employees have common control over the area and thus each can consent to a search. *See* note 7, *supra*.

[13] There is no support for the implication in petitioners' argument, Br. at 16-20, that the legitimacy of an individual's expectatation of privacy depends on which governmental authority is conducting the search. *See, e.g. Donovan* v. *Dewey*, 452 U.S. 594, 599 (1981); *Camara* v. *Municipal Court*, *supra*, 387 U.S. at 530. That factor, as we discuss below, may affect the standard of reasonableness that applies to a particular search. *See* p. 33, *infra*. But in the absence of a legitimate privacy expectation, any governmental search would be proper.

(or by the employer acting at the direction of the police) for evidence of a crime. In addition, a supervisor who is concerned that an employee may be considered for a job that the supervisor wants, or who believes that an employee is making critical comments about him to other supervisors, may find it helpful to look around the office to see if he can turn up interesting or embarrassing information. Similarly, a government agent who is trying to persuade an employee to cooperate in an outside investigation may also conclude that an office search could lead to evidence that might facilitate his effort. The position taken by petitioners would permit all of these searches and more. There is no basis for such wholesale disregard for the privacy interests of all public employees.

At the same time, however, we recognize that there may be occasions when the legitimate demands of a particular workplace justify curtailing an employee's expectation of privacy. For example, a government employee whose primary responsibility is to answer public inquiries on the telephone may not expect that his supervisors will never monitor his calls to see how he is performing his job. Likewise, when a job involves dealing with highly sensitive information or handling valuable property, the government may have a need to conduct routine searches of otherwise private areas to protect its interests. It can accomplish this goal, where appropriate, by adopting a rule or regulation advising employees that certain areas will be subject to such searches and that private materials should not be stored or private activities conducted in these areas. As previously indicated, no such rule or practice was in effect in this case. *See* note 10, *supra*.[14]

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[14] Although the issue is not presented here, we do not think that a public employer, merely by promulgating a rule authorizing searches,

The decisions of the courts of appeals that have addressed these issues are consistent with the approach that we suggest. Thus, those courts have repeatedly found that government employees have a constitutionally-protected privacy interest in their offices as well as in other work-related areas. *See, e.g., United States* v. *Blok*, 188 F.2d 1019 (D.C. Cir. 1951) (search of employee's desk); *United States* v. *Hagarty*, 388 F.2d 713 (7th Cir. 1968) (tap on employee's phone);[15] *United States* v. *Speights*, 557

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can automatically eliminate all Fourth Amendment protection at the workplace. *See Smith* v. *Maryland*, *supra*, 442 U.S. at 740 n.5. *Cf. Stoner* v. *California*, *supra*, 376 U.S. at 488 (questioning whether state law allowing hotel clerks to authorize police to search hotel rooms would be constitutional). As suggested in text, however, the legitimate needs presented by certain kinds of public jobs might call for a special approach. These situations would be somewhat analogous to administrative business searches of highly regulated industries "in which consent to regulatory restrictions is presumptively concurrent with participation in the regulated industry." *Delaware* v. *Prouse*, 440 U.S. 648, 662 (1979), *citing United States* v. *Biswell*, 406 U.S. 311 (1972) (firearms), and *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72 (1970) (liquor). But such circumstances are "relatively unique," *Marshall* v. *Barlow's, Inc.*, *supra*, 436 U.S. at 313, and should not become a pretext for eliminating all office-based privacy in every government job. At a minimum, a pre-existing policy barring an employee's traditional office-based expectations of privacy should be upheld only when the government "has reasonably determined that warrantless searches are necessary to further" important employment-related interests. *Donovan* v. *Dewey*, *supra*, 452 U.S. at 600.

[15] In a later case, *United States* v. *Nasser*, 476 F.2d 1111, 1124 (7th Cir. 1973), the court distinguished *Hagarty* on the ground that pre-*Katz* standards were to be applied to the search in question. The court nevertheless recognized that, even prior to *Katz*, "a government office as well as one in the private sector is not a public area, and trespass can be committed against one who occupies the office." *Id.* at 1123.

F.2d 362 (3d Cir. 1977) (search of police locker); *Gillard* v. *Schmidt*, 579 F.2d 825 (3d Cir. 1978) (search of guidance counselor's desk); *United States* v. *McIntyre*, 582 F.2d 1221 (9th Cir. 1978) (bug of police official's office).[16]

The exception to this line of cases has been in those circumstances where a public employer has "an accepted practice or regulation" advising employees that a particular work-area is not private and may be searched routinely. *Gillard* v. *Schmidt*, *supra*, 579 F.2d at 828. Uniformly, these case have involved jobs where there is an especially high risk of theft or other special security concerns. *See United States* v. *Bunkers*, 521 F.2d 1217 (9th Cir.) (search of postal locker conducted pursuant to regulation), *cert. denied*, 423 U.S. 989 (1975); *United States* v. *Sanders*, 568 F.2d 1175 (5th Cir. 1978) (per curiam) (same); *United States* v. *Donato*, 269 F. Supp. 921 (E.D. Pa.), *sum. aff'd*, 379 F.2d 288 (3d Cir. 1967) (search of U.S. Mint locker pursuant to regulation); *Shaffer* v. *Field*, 339 F. Supp. 997 (C.D. Cal. 1972), *aff'd*, 484 F.2d 1196 (9th Cir. 1973) (per curiam) (search of sheriff's locker pursuant to pre-existing policy). *Cf. United States* v. *Collins*, 349 F.2d 863, 867-68 (2d Cir. 1965), (search of customs employee's work-jacket to retrieve stolen emerald), *cert. denied*, 383 U.S. 960 (1966).[17]

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[16] In *Williams* v. *Collins*, 728 F.2d 721, 728 (5th Cir. 1984), the court, while ruling on a qualified immunity claim in a § 1983 action, noted, without deciding, that "[i]t is by no means certain that [plaintiff] had a reasonable expectation of privacy in his government-furnished desk."

[17] Although *Collins* did not specifically rely on any pre-existing regulations or practice regarding searches, the court noted the "extremely broad" investigative authority of customs and postal agents, and stressed that the search was conducted in a "public area which was not shown to be segregated from the other work areas."

In sum, except in certain limited circumstances not present here, a public employee has a legitimate expectation of privacy in his office, desk and file cabinet that is entitled to Fourth Amendment protection. Since petitioners intruded upon that privacy expectation in this case, the question that remains is whether their intrusion was reasonable.

II. AN INVESTIGATIVE SEARCH BY A GOVERNMENT EMPLOYER MUST BE CONDUCTED PURSUANT TO A WARRANT BASED ON PROBABLE CAUSE OR, AT A MINIMUM, SOME QUANTUM OF INDIVIDUALIZED SUSPICION, NEITHER OF WHICH WAS PRESENT HERE.

Petitioners' final argument is that the search they conducted was proper since any search of an employees' office, desk and file cabinet should "be deemed reasonable so long as it is conducted for a work-related concern." Br. at 24; *accord* U.S. Br. at 15. This broad, open-ended standard would provide all levels of supervisory personnel with unbridled discretion to search their employees' offices for any arguably work-related reason. In our view, the Fourth Amendment demands considerably more before an employee's privacy can be invaded. While different standards of reasonableness may appropriately govern different types of work-related searches, when the purpose of an office search is to uncover personal evidence to be used against an employee under investigation—be it to fire him or prosecute him—the traditional standard of a warrant based on probable cause must be met. In any

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349 F.2d at 868. By contrast, the court pointed out that there were employee lockers located in a private area of the customs building and made clear that it meant to "imply nothing as to the constitutionality of a search of such a locker." *Id.* at 868 n.6.

event, there must, at a minimum, be some individualized showing of "reasonable suspicion" before such an investigative search can be found valid. Under either standard, the search in this case was unconstitutional.

A. An Exhaustive Office Search For Personal Evidence To Be Used Against A Public Employee Under Investigation Requires A Warrant Based On Probable Cause.

Asserting that the "[g]overnment's needs in this type of case are even greater than the needs recognized in [the school search case]," Br. at 23, petitioners claim that they are entitled to unprecedented authority when conducting investigative searches relating to employment. The special needs that they rely on to support this broad grant of discretion are workplace efficiency, discipline and informality. Br. at 22. In our view, petitioners' analysis is flawed both in its approach and its conclusion.

As we show, the presumptive standard of reasonableness—a warrant based on probable cause—serves important constitutional functions that should not be lightly disregarded. In this case, none of the few justifications for adopting a lesser standard, including the kind of "special circumstances" relied on in the school setting, are present. On the contrary, an investigative search into areas within the workplace where the employee reasonably expects privacy presents many of the same considerations as does a criminal search. The government can satisfy most of its legitimate work-related concerns without a search. To the extent that it wishes to search for and seize personal information that is kept within an employee's office—and to use that information against the employee—its need is diminished and an employee's privacy interests are great. In those circumstances, the gov-

ernment should be required to proceed pursuant to a warrant based on probable cause.[18]

1. The Traditional Standard Of Reasonableness And Its Limited Exceptions.

By its terms, the Fourth Amendment requires only that governmental searches and seizures be "reasonable." The Amendment itself, however, also has something to say about what is reasonable. Its second clause thus provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." In view of this language, it has long been recognized that the presumptive standard of reasonableness for both civil and criminal searches is a warrant based on probable cause. *See, e.g.*, *Camara* v. *Municipal Court*, *supra*, 387 U.S. at 528-29; *California* v. *Ciraolo*, 54 U.S.L.W. 4471, 4475 (U.S. May 19, 1986), (Powell, J., dissenting), quoting *United States* v. *Karo*, *supra*, 104 S.Ct. at 3304 ("Warrantless searches are presumptively unreasonable . . . ."). This standard is not merely texturally based; it also serves important functions in ordering state-individual relationships.

The warrant requirement "reflects the 'basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of government.'" *Arkansas* v. *Sanders*, *supra*, 442 U.S. at 759, quoting *United States* v. *United States District Court*,

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[18] This standard appropriately should be modified to include not only probable cause of a crime but also probable cause of a work-related violation when that is the basis for an investigative search. *See New Jersey* v. *T.L.O.*, *supra*, 105 S.Ct. at 744.

407 U.S. 297, 317 (1972). It is premised on the recognition that those who conduct an investigation are usually too zealous "to be the sole judges of when to utilize constitutionally sensitive means in pursuing their task." *United States* v. *United States District Court*, *supra*, 407 U.S. at 317. A warrant also defines "the scope and objects of the search, beyond which limits the inspection is not expected to proceed." *Marshall* v. *Barlow's, Inc.*, *supra*, 436 U.S. at 323 (footnote omitted). In this manner, it prevents a legitimate search from being transformed into a fishing expedition, and also assures that the assessment of reasonableness is made *before* the search, so that the constitutional question is not subject to post-hoc rationalization, possibly colored by the fact that helpful evidence has been uncovered.[19]

The probable cause standard is an expression of the likelihood of success required before a search can be conducted. This basic threshold reflects a general assessment of the competing governmental and individual interests typically at stake in a search: the former usually relate to efficient law enforcement; and the latter involve primarily "the right to be let alone," but also include a measure of protection "against compulsory production of evidence to be used against [the individual]." *Davis* v. *United States*, 328 U.S. 582, 587 (1946) (citations omitted). *See also Camara* v. *Municipal Court*, *supra*, 387 U.S. at 531 ("self protection" interest at stake in administrative search).

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[19] The importance of this last function is well-illustrated by the facts of the instant case. Although the search clearly appears to have been investigative in purpose, petitioners have repeatedly attempted to portray it as a pure inventory search that just happened to turn up evidence that could be used against respondent. *See* note 20, *infra*. Had a warrant been required, this confusion would have been clarified at the outset.

"The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests." *Brinegar* v. *United States*, 338 U.S. 160, 176 (1949).

Despite the important as well as the presumptive validity of this traditional test of reasonableness, "the Court has recognized a few limited exceptions to the general rule." *United States* v. *Karo*, *supra*, 104 S.Ct. at 3304. These exceptions are premised on the fact that not every type of search will implicate precisely the same individual and/or governmental interests. Thus, where the intrusion on privacy is very limited, *see*, *e.g.*, *Terry* v. *Ohio*, 392 U.S. 1, 23-27 (1968) (stop and frisk); *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 879-80 (1975) (brief auto stop), or where there are exigent circumstances that make quick action necessary, *see*, *e.g.*, *North American Cold Storage Co.* v. *City of Chicago*, 211 U.S. 306 (1908) (seizure of unwholesome food); *Schmerber* v. *California*, 384 U.S. 757, 770-71 (1966) (imminent destruction of evidence), or in rare instances where special governmental needs are present, *see*, *e.g.*, *Bell* v. *Wolfish*, 441 U.S. 520, 558-560 (1979) (body cavity searches of detainees); *New Jersey* v. *T.L.O.*, *supra*, 105 S.Ct. at 743 (school searches), the warrant requirement has been suspended, and, at times, the requirement of probable cause has been reduced to reasonable suspicion. In addition, "because [administrative] searches are neither personal in nature nor aimed at the discovery of evidence of crime," they are governed by a modified standard of probable cause, but a warrant still usually remains necessary. *Camara* v. *Municipal Court*, *supra*, 387 U.S. at 537.

In sum, the standard of reasonableness in the Fourth Amendment context, while "not capable of precise definition or mechanical application," *Bell* v. *Wolfish*, *supra*,

441 U.S. at 559, must nevertheless be determined against the backdrop of established precedent and carefully-drawn principles. It is to that task that we now turn on the basis of the facts presented in this case.

2. Investigative Work-Related Office Searches.

The search at issue here was comprehensive in scope and investigative in purpose. As the court of appeals explained, "[t]he entry into the office seems to have been for no other purpose than to secure evidence for use in the ongoing investigation of Ortega." Pet. App. 6.[20] In these

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[20] Petitioners continue to dispute this view, characterizing their search as an "administrative inventory of the contents of an office," Br. at 8, and insisting that its purpose was "to have state property identified and secured," Br. at 4. *See also* Br. at 8 n.5. The evidence plainly demonstrates, however, that petitioners' description is incomplete at best and, more likely, simply inaccurate. Even according to petitioner O'Connor, the search was intended in part to locate "records that had to do with . . . the areas that we were interested in investigating, and we wanted to—I felt it was reasonable to have access to what that material might be." J.A. 40. *See also* J.A. 38, 42. Consistent with this purpose, the officials who conducted the search immediately seized personal papers—including private correspondence and billing information relating to a private patient—that they believed were relevant to the charges against Ortega. J.A. 42, 54-58. Obviously, there would have been no reason to seize this material if the search was being conducted for the reasons that petitioners suggest.

Moreover, while there was deposition testimony stating that the search was also conducted in order to inventory the office contents and to separate state from private materials, J.A. 40, 63-64, the undisputed facts plainly suggest otherwise. In the first place, no inventory or separation of property was ever made. J.A. 62. Further, when the search was conducted, no decision to terminate Ortega had been reached and thus there was no reason to be emptying his office at that time. *See* note 10, *supra*. Finally, if petitioners were conducting an inventory (rather than an investigative search), it is difficult to see why Ortega, who plainly could have assisted in such an effort, was explicitly excluded.

circumstances, the usual justifications for modifying the traditional test of reasonableness were not present. To begin with, the intrusion on respondent's office-based privacy was anything but limited. Moreover, there were no exigent circumstances relating to the destruction or taking of property or evidence since respondent's office had readily been secured by changing its lock. J.A. 59.[21] And, in contrast to an administrative search, the search at issue here was specifically focused on someone who was already under suspicion. Petitioners do not even dispute these points. They rely instead on a claim of "special circumstances," seeking to analogize the instant case to the school searches in the *T.L.O.* case. In our view, the analogy is inapt and the claim of special circumstances is meritless.

a. The Analogy To School Searches.

Petitioners' reliance on *New Jersey* v. *T.L.O.*, *supra*, to support a diluted standard of reasonableness for all work-

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[21] At one point petitioners state that "[f]urther justification for the entry [into Ortega's office] was based on a report to Dr. O'Connor that Dr. Ortega had returned to hospital grounds and removed the computer in question from the hospital to his home during the weekend of August 15 and 16. Dr. O'Connor was concerned that a theft of state property may have occurred." Br. at 4 (citation and footnote ommitted). The court of appeals apparently agreed with this suggestion. Pet. App. 5 n.2. We do not think that the record plausibly can be read to support such a view, however. Both Dr. O'Connor and the hospital administrator, Friday, explicitly testified that the removal of the computer was *not* a basis for entering the office. J.A. 39, 59. In any event, a search for the computer itself—irrespective of the standard required—would have supported nothing further than an entry into Dr. Ortega's office. The additional searches of his desk and file cabinets could not have been justified on that ground. *See, e.g.*, *Terry* v. *Ohio*, *supra*, 392 U.S. at 20 (actual search must be "reasonably related in scope to the circumstances which justified the interference in the first place"); *United States* v. *Place*, 462 U.S. 696, 705-06 (1983).

related office searches is misplaced.[22] The controlling considerations in that case were, first, the recognition that "maintaining security and order in the school requires a certain degree of flexibility in school disciplinary procedures," and, second, the significance attributed to "the value of preserving the informality of the student-teacher relationship." 105 S.Ct. at 743 (citations omitted). The warrant requirement and the probable cause standard were both found to be incompatible with fostering these important interests.

The same considerations are not present here. The need to "maintain discipline in the workplace," Pet. Br. at 22, does not present nearly the kind of problem that the same need presents in the schools. Many students, unfortunately, do not want to be in school and therefore are often disruptive. Teachers and administrators nevertheless have an obligation to work with these students and to keep them in school if at all possible. The combination of such factors often makes it as difficult to maintain order in schools as almost any place other than in correctional facilities. By contrast, employees, who are usually more mature than students, are aware that their livelihoods are at stake. The threat of dismissal, lack of promotion and other workplace incentives thus serve to maintain at least a reasonable level of decorum.

By the same token, concerns about "the informality of the employer-employee relationship," Pet. Br. at 22, are also not analogous to the school situation. The employer-employee relationship is, at bottom, a business rela-

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[22] Curiously, despite their heavy reliance on *T.L.O.*, petitioners nevertheless seek an even broader standard of reasonableness for a workplace search than what they describe as the "somewhat formalized" standard applicable to school searches. Br. at 24. That position is way off the mark. *See* pp. 40-43, *infra*.

tionship. Unlike a teacher, an employer does not serve an *in loco parentis* function, seeking to instill basic values in those in his charge. This difference in function, in turn, means that the need for, and even the appropriateness of, informality is likely to be very different in the two settings. Certainly when, as here, the employer is looking for evidence that can lead to an employee's dismissal, the relationship has moved well beyond the stage of informality and, if anything, has already become adversarial. The significance of this last point is underscored by the fact that, even in the schoolhouse, the Court left open the possibility that a different standard of reasonableness might be appropriate for "searches conducted by school officials in conjunction with or at the behest of law enforcement agencies." *New Jersey* v. *T.L.O. supra*, 105 S.Ct. at 744 n.7. For these reasons, *T.L.O.* simply will not carry the burden that petitioners have assigned to it in this case.

b. The Government's Need For Efficiency And The Competing Individual Interests.

The final justification that petitioners point to for reducing the traditional Fourth Amendment standard of reasonableness is one that was not present in *T.L.O.*: *i.e.*, the government's need to operate "efficiently and effectively through proper supervision and administration of its employees." Br. at 22. Once again, we do not dispute that his is an important concern. We do think, however, that the relationship between that concern and a government employer's need to conduct investigative searches like the one at issue here is far less than petitioners would like it to appear.[23] Properly understood, moreover, the

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[23] In fact, petitioners do not even directly address this relationship at all, although they quote the general rule that the test of reason-

concern about workplace efficiency should not be found adequate to justify abridging an employee's significant privacy interests on less than the traditional standard of reasonableness.

The first thing to realize about the government's legitimate employment needs is that in almost all instances they can be satisfied without conducting an investigative search of an employee's office. The materials in an office that are likely to be most relevant "in evaluating an employee's performance, even when he is suspected of misconduct," U.S. Br. at 18, are employment-related papers and documents. But, those materials, as well as any other government property in an employee's office, must be turned over upon demand. *See, e.g., Wilson* v. *United States, supra,* 221 U.S. at 380 ("[I]n the case of public records and official documents, made or kept in the administration of public office, the fact of actual possession or of lawful custody would not justify the officer in resisting inspection, even though the record was made by himself and would supply the evidence of his alleged criminal dereliction.") An employee who fails to comply with

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ableness derives from "balancing the need to search against the invasion which the search entails." *Camara* v. *Municipal Court, supra,* 387 U.S. at 536-37, quoted in *New Jersey* v. *T.L.O., supra,* 105 S.Ct. at 741. This rule, however, plainly does not mean that the importance of the government purpose, by itself, should affect the standard of reasonableness. Obviously, the government's interest in apprehending and convicting violent offenders is very great, but that is no basis for relaxing Fourth Amendment protections. The key consideration is the relationship between the *need to search* and the government purpose. For example, random auto stops to check licenses clearly serves a lesser governmental purpose than traditional law enforcement. But there may be no other way to accomplish the first function, and thus it is governed by a much less stringent standard of reasonableness. *See Delaware* v. *Prouse, supra.*

such a request can be dismissed for that reason alone.[24] *See, e.g., Gardner* v. *Broderick*, 392 U.S. 273, 278 (1968). At that point, of course, the government has no further interest in evaluating the employee's performance or need to pursue a discharge proceeding.[25]

A search of an employee's office intended to facilitate an investigation of work-related charges, therefore, serves only one necessary purpose: to provide access to *private* materials that would not otherwise be available to the government. When that is the purpose of a search, however, the balance of governmental and individual interests points to a strict standard of reasonableness. On the one

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[24] No such request to turn over government papers was made of respondent in this case.

[25] If the government still needs to retrieve its property in these circumstances, there are reasonable means available for it to achieve that goal as well. As indicated above, when exigent circumstances are present—based on a concern that government property may be taken or destroyed—the property can be seized without a warrant. *See* p. 29, *supra*. In other situations, the government should be able to protect its interests through impounding the office by changing the locks or through some other reasonable approach. For example, in *Chocallo* v. *Bureau of Hearings and Appeals*, 548 F.Supp. 1349, 1363 (E.D. Pa. 1982), *aff'd*, 716 F.2d 889 (3d Cir.), *cert. denied*, 464 U.S. 983 (1983), after an administrative law judge had been asked to turn over a case file on a matter that had been reassigned by an order of the Appeals Council, the judge's superior authorized his secretary "to enter the [judge's] office and to make a visual inspection for the [requisite] file, but not to open any drawers or file cabinets." Even if deemed a search, we do not think that a limited entry for this kind of non-investigative purpose would be unreasonable. *See also Jafree* v. *Scott*, 372 F.Supp. 264, 274 (N.D. Ill. 1974) (supervisors "had a right and duty to inspect documents and property that were being packaged and removed from the offices of the Attorney General by [a discharged employee]"), *aff'd in part, rev'd in part*, 519 F.2d 1405 (7th Cir. 1975).

hand, that kind of material will almost invariably be of limited importance in evaluating an employee's work behavior and performance. While the government may have an abstract interest in knowing about an employee's private activities, and how they reflect on his integrity, that interest only becomes truly significant when the employee's private activities affect his job performance. To find the answer to that latter question, however, the government has many appropriate options readily available to it, including observing the employee, examining his work product, and talking with his supervisors and coworkers as well as with the employee himself. In short, as in the law enforcement area generally, there are usually other investigative means available to satisfy the government's legitimate concerns.

On the other hand, when the government seeks the authority to search for private materials that are kept in an employee's office and to use those materials against the employee at a discharge proceeding, the individual interests at stake are very substantial. Contrary to the implication suggested by the United States, in that situation, much as in a criminal investigation, the individual has already been "singled out on the basis of suspicion," and the government is attempting "to ferret out evidence of [wrongdoing]." U.S. Br. at 16. In both instances, moreover, the government is claiming the right to search for, and to use, an individual's private materials to further its antagonoistic objectives.

In addition, although being fired for violating a work rule is not the same as being convicted of a crime, it is clearly a serious sanction, resulting both in the loss of employment and in stigmatizing an employee. *See Board of Regents* v. *Roth*, *supra*, 408 U.S. at 573. Indeed, many violations that are sufficient to justify an employee's dis-

missal may lead to a criminal prosecution as well. *See* note 8, *supra*. In the present case, for example, petitioners claim that they were concerned "that a theft of state property may have occurred." Br. at 4. If the search of Dr. Ortega's office had substantiated that concern, there is no reason to expect that he would not have been prosecuted as a result.

In sum, the competing individual and governmental interests at stake in an investigative search of a public employee are very similar to those at stake in a criminal case. While it is doubtless true that the government could be more efficient in both instances if it could search at will or even under a diminished standard of reasonableness, that measure of efficiency simply comes at too great a cost.

The Court has previously recognized a similar point in the Fifth Amendment context, holding that the government cannot require a public employee to forgo his privilege against self-incrimination. *See, e.g., Gardner* v. *Broderick, supra; Garrity* v. *New Jersey, supra; Uniformed Sanitation Men Association* v. *Commissioner of Sanitation*, 392 U.S. 280 (1968). As the most recent case in this line explained, the "[g]overnment has compelling interests in maintaining an honest police force and civil service, but this Court did not permit those interests to justify infringement of Fifth Amendment rights in *Garrity, Gardner,* and *Sanitation Men,* where alternative methods of promoting state aims were no more apparent than here." *Lefkowitz* v. *Cunningham*, 431 U.S. 801, 808 (1977). In like manner, the application of full Fourth Amendment protections would limit the government's ability to search for evidence of personal wrongdoing that might also call into question an employee's integrity, but that, in the end, much like the invocation of the Fifth

Amendment privilege, may have no real effect on his actual work performance.[26] Significantly, in both instances, the government still remains able to evaluate that performance directly. Thus, just as a public employee receives full Fifth Amendment protection despite its potential effect on workplace efficiency, he is entitled to the full protection of the Fourth Amendment as well.[27]

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[26] Since the Amendments themselves operate differently, their precise effects on the workplace necessarily vary. For example, because a public employer has a need to evaluate his employees, the Fifth Amendment does not prohibit him from requiring an employee "to answer questions specifically, directly and narrowly related to the performance of his official duties." *Gardner* v. *Broderick*, *supra*, 392 U.S. at 278. But the answers to those questions, unlike the evidence uncovered in an office sear[illegible] cannot be used against the employee in a criminal proceeding. *It* Moreover, the Fourth Amendment, in contrast to the Fifth, d[illegible]ot bar access to certain information altogether; it only require[illegible]at the search be reasonable. In that regard, there is no reason [illegible]believe that government employers "could not achieve their go[illegible]within the confines of a reasonable warrant requirement," *Camara* v. *Municipal Court*, *supra*, 387 U.S. at 533, when they are conducting an investigative search.

[27] The courts of appeals that have found that a public employee has a legitimate expectation of privacy in his office have all held that a search must satisfy the traditional Fourth Amendment standard of reasonableness, although the searches in those cases arose in somewhat different contexts, and were usually conducted by law enforcement authorities. *See* cases cited at pp. 23-24, *supra*. *United States* v. *Blok*, *supra*, does not support a contrary result, as the United States suggests. Br. at 19. The *Blok* court stated, "[n]o doubt a search of [an employee's desk] without her consent would have been reasonable if made by some people in some circumstances. Her official superiors might reasonably have searched the desk for official property needed for official use." 188 F.2d at 1021. That general dictum, however, simply does not address the kind of search at issue here. When an employer goes into an office looking for a file that it needs for work (rather than for personal information relevant to an investigation of an employee under suspicion), the balance of individual and government interests is entirely different, even assuming that the entry could properly be categorized as a search at all. *See* pp. 17-18, *supra*.

Nor would such a conclusion mean, as the United States suggests, that a supervisor or co-worker would have "to apply to a magistrate for a warrant every time he needs to enter an employee's office." Br. at 16. On the contrary, the warrant requirement would, as it should, remain the exception in the workplace. As we indicated above, a "routine office entry" typically does not even raise a Fourth Amendment question. *See* pp. 17-18, *supra*. Similarly, a public employer may, in appropriate circumstances, adopt regulations or policies advising an employee ahead of time that certain areas are *not* private and thus will be subject to search. *See* p. 22, *supra*. In addition, searches that are not investigative in nature—such as a true office inventory, or perhaps even a random search designed to *deter* certain activities at the workplace—might properly be subject to a different standard of reasonableness. *See, e.g., Chenkin* v. *Bellevue Hospital Center, supra* (checkpoints at hospital exits to conduct random searches of employee's packages and knapsacks; employee has option of checking these matters before entering hospital). *Cf. Delaware* v. *Prouse, supra* (routine automobile stops for license and registration checks).

Even in the investigative context, moreover, not every search need be made pursuant to a warrant based on probable cause. In addition to the usual exceptions to the warrant requirement, such as for exigent circumstances, there may also be other occasions where a lesser standard is justified. For example, in jobs that raise special concerns--such as those involving national security or other highly sensitive matters—the balance of relevant considerations might support a different approach. *See, e.g., Security & Law Enforcement Employees, District Council 82* v. *Carey*, 737 F.2d 187, 203-04 (2d Cir. 1984) (body cavity searches of correction officials may be based on reasonable suspicion because of the special problems of prison administration).

In the instant case, however, no such extenuating factor was present. The search of respondent's office, therefore, could only be undertaken pursuant to a warrant based on probable cause. By failing to meet that standard, petitioners violated Dr. Ortega's Fourth Amendment rights.

B. Even Under A Minimalist "Reasonable Suspicion" Standard The Search Of Respondent's Office Was Invalid.

Minimizing, if not trivializing, an employee's interest in office-based privacy, and ignoring the specific governmental need for investigative searches at the workplace, petitioners and the United States propose that any search of an office "be deemed reasonable if conducted for a work-related concern." Pet. Br. at 24; *accord* U.S. Br. at 15. In our view, this is no standard at all: it provides a wide range of government officials with exceptionally broad, discretionless authority to search their employees' offices. Even assuming that, in light of the special needs of the workplace, the Fourth Amendment is found not to require a warrant and probable cause for an employment-related investigative search of an office, such a search must, at a minimum, be based on a standard of "reasonable suspicion."

The principles that govern this determination are well-settled. "The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' *upon the exercise of discretion* by government officials . . . ." *Delaware* v. *Prouse*, *supra*, 440 U.S. at 653-54 (emphasis supplied). In almost all instances, this is achieved through requiring "some quantum of individualized suspicion," *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 560 (1976), which has the effect of assuring "that the facts upon which an intrusion is based [will] be capable

of measure against an 'objective standard.'" *Delaware* v. *Prouse*, *supra*, 440 U.S. at 654, quoting *Terry* v. *Ohio*, *supra*, 392 U.S. at 21. In the few situations where "the balance of interests precludes insistence upon 'some quantum of individualized suspicion,' other safeguards are generally relied on to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field.'" *Delaware* v. *Prouse*, *supra*, 440 U.S. 654-55 (citations and footnotes omitted).

Applying these principles to the instant case—*i.e.*, to a search which is investigative in purpose and personal in nature—we think it is clear that at least some requirement of individualized suspicion is necessary.[28] As indicated above, the fact that the government is claiming the authority to search for private information to use against an employee demonstrates that the intrusion on the individual's interests is substantial. Such an intrusion should not be tolerated on the basis of a Fourth Amendment standard that lacks any objective individualized focus unless

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[28] The standard proposed by petitioners and the United States does not even provide for the kinds of external checks on the exercise of official discretion—such as review by a disinterested superior let alone a magistrate—that usually govern searches in the absence of a requirement of individualized suspicion. That view, however, ignores the fact that "[t]he 'grave danger' of abuse of discretion does not disappear simply because" the government acts as an employer. *Delaware* v. *Prouse*, *supra*, 440 U.S. at 662, quoting *United States* v. *Martinez-Fuerte*, *supra*, 428 U.S. at 559. Only in very rare and specialized circumstances has such broad governmental authority to search been upheld. *See United States* v. *Martinez-Fuerte*, *supra* (border stops of automobiles); *United States* v. *Villamonte-Marquez*, 103 S.Ct. 2573 (1983) (entries on ships to inspect papers conducted pursuant to legislation initially adopted at the time of the Bill of Rights).

there are compelling reasons to do so.[29] The generalized claims concerning the need for efficiency in the workplace that have been advanced in this case are plainly insufficient to meet that burden.

Indeed, this Court has never approved a standard of reasonableness in any Fourth Amendmnt case involving a search of an individual who is under investigation on a lesser standard than "reasonable suspicion." Even in the schoolhouse, where constitutional protections are usually the most diluted, the Court has held that there must be "reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." *New Jersey* v. *T.L.O.*, *supra*, 105 S. Ct. at 744 (footnote omitted). When the government seeks to conduct a full-scale investigative search of an area in which an employee has a legitimate privacy expectation, certainly at least that much of a standard must be satisfied.[30]

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[29] As indicated above, *see* p. 39, *supra*, the need for individualized suspicion might be different when a search is not being used to uncover evidence against an individual already under investigation. *See New Jersey* v. *T.L.O.*, *supra*, 105 S.Ct. at 744 n.8.

[30] The United States "emphasize[s] that this would be a different case if petitioners had searched a private item found in the office, such as a briefcase or a purse, . . . [because] employees have a far stronger expectation of privacy in such personal effects . . . , and the government's need to search for business-related reasons is substantially less compelling." U.S. Br. at 21 (citation and footnote omitted). The distinction is unconvincing. An employee's briefcase, much like his desk and file cabinets, often contains work-related materials along with personal materials. (If anything, a desk is more likely to contain personal materials.) Thus, an employee's expectation of privacy, as well as the government's need for access, would appear to be similar with respect to a desk and briefcase. The sole distinction, in most instances, is that the employee owns his briefcase, but not his desk.

Finally, we belive that, tested against any standard containing an element of individualized suspicion, the search in the instant case must be found wanting. Throughout this litigation petitioners have never taken the position that they had any basis for concluding that evidence relating to the charges pending against Dr. Ortega would be found in his office. Rather, they simply searched the office, thinking it was "reasonable to have access to what that material might be"—*i.e.*, to whatever material they might find that would be relevant "to the areas we were interested in investigating."[31] J.A. 40. Plainly they had no basis to expect that they would find the private materials that they actually seized: the personal correspondence from respondent's former resident and the billing information relating to his private patient.

In sum, an appropriate balance of the competing interests in the present case merits adherence to the traditional Fourth Amendment standard of reasonableness: a warrant based on probable cause. At minimum, however, a standard requiring some measure of individualized suspicion was necessary. Since petitioners are unable to satisfy any such standard, their search of respondent's office was unconstitutional.

But that fact is not only insignificant in these circumstances, *see* pp. 14-15, *supra*, it is also not always true. There are times, especially when an employee needs to transport large amounts of paper, when the employer provides a briefcase. And, on occasion, an employee might even purchase his own desk or file cabinets. Under the United States' view, these distinctions in ownership apparently would significantly affect the privacy protections of an employee.

[31] Even assuming that petitioners had reasonable grounds for suspecting that respondent had taken the computer during the weekend of August 15-16, 1981, that concern was neither the basis of the search nor sufficient to justify its scope. *See* note 21, *supra*.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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